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OFFICIAL OPINIONS

OF

THE ATTORNEYS GENERAL

OF

THE UNITED STATES

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITED BY

GEORGE KEARNEY

AND

EMILY A. SPILMAN

SYLLABI PREPARED BY

W. O. BURTNER

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VOLUME 38

CONTAINING

THE OPINIONS OF THE ATTORNEY GENERAL

HON. HOMER CUMMINGS

of Connecticut

AND

OPINIONS BY ACTING ATTORNEYS GENERAL

HON. WILLIAM STANLEY

HON. J. CRAWFORD BIGGS

HON. STANLEY REED

HON. JOHN DICKERSON

HON. JOSEPH B. KEENAN

HON. HARRY W. BLAIR

ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, THE UNITED STATES CODE, THE REVISED STATUTES, THE CONSTITUTION, TREATIES AND CONVENTIONS, EXECUTIVE ORDERS, OPINIONS OF THE ATTORNEYS GENERAL, AN INDEX TO SUBJECTS, AND AN INDEX-DIGEST

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BY

EMILY A. SPILMAN

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OPINIONS

OF

HON. HOMER CUMMINGS, OF CONNECTICUT

APPOINTED MARCH 4, 1933

SALE OF INTERNAL REVENUE STAMPS TO MANUFACTURER OF FERMENTED LIQUORS

The Attorney General declines to render an opinion upon the question whether a collector of internal revenue must sell stamps evidencing payment of the taxes imposed by section 608 of the Act of February 24, 1919, 40 Stat. 1109, to a manufacturer of fermented liquors, as this question is judicial in nature.

DEPARTMENT OF JUSTICE,
July 5, 1934.

SIR: I have the honor to refer to your letter of June 1, 1934, wherein you request my opinion on the following question:

"Must a collector of internal revenue sell stamps evidencing payment of the taxes imposed by section 608 of the Act of February 24, 1919 (R. S. 3339; 40 Stat. 1109, U. S. C. Supp. VII, Title 26, section 1330 (a) and (b)), to a manufacturer of fermented liquors whose notice has been accepted and whose bond has been approved by the local district supervisor of the Bureau of Internal Revenue even though the sale of all intoxicating liquors is prohibited by the laws of the state in which the sale of such liquors is contemplated?"

I understand that this question arises as a result of the fact that at one time tax stamps were issued by the Treasury Department to the Atlanta Ice and Bottling Company, Atlanta, Georgia, but that some time ago the Treasury Department directed the Collector of Internal Revenue not to

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issue any more tax stamps to this company and the latter now threatens or contemplates legal action against the Collector.

The question presented is judicial in nature. If I should answer it in the negative, my opinion would not be binding upon the Atlanta Ice and Bottling Company and the company would, no doubt, resort to the courts for judicial determination of the matter. The result might be to bring the Attorney General into conflict with a judicial tribunal. On the other hand, an affirmative answer would doubtless prevent this important question from reaching the courts for determination, a result which ought to be avoided if possible (35 Op. 273, 281).

My predecessors have frequently held that the Attorney General is not authorized to render opinions upon judicial questions (28 Op. 596; 19 Id. 56; 22 Id. 181; 29 Id. 226; 30 Id. 381; 32 Id. 472). I am in harmony with this view.

Accordingly, I must decline to render an opinion upon the question presented by you.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION

The attempted taxation of the real or personal property owned by the Federal Subsistence Homesteads Corporation by State, county, city, or other local taxing authorities should be contested, the question of liability being ultimately for the courts to determine.

The occupants of the homesteads will not be "wards of the Federal Government", in the sense that they are removed from the political status of residents of the State and of the subdivision thereof in which they live, but will be entitled to the rights and privileges, and subject to the duties and obligations, of citizens and will be subject to arrest by local authorities. Their right to vote will depend upon State law.

As citizens and as potential taxpayers, the occupants of the homesteads will be entitled to such police and fire protection as may ordinarily be provided by the State, county, or municipality for communities similarly situated; will be entitled to use the public schools and the public roads; and will be entitled to have their needs for such facilities considered by the local authorities in like manner as other citizens.

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To the extent that the Corporation must supply a facility it may contract therefor, and there is no disability to contract with a State or other political subdivision for the supplying of a facility which the State or other political subdivision is not otherwise legally obligated to furnish.

It is unnecessary for the Federal Subsistence Homesteads Corporation to qualify and register as a foreign corporation in States other than Delaware.

The attempted imposition of license, franchise, occupation, income, and excise taxes upon the Federal Subsistence Homesteads Corporation by Delaware or any other State should be contested, the question of liability being ultimately for the courts to determine.

The Federal Subsistence Homesteads Corporation may lawfully acquire options as an incident of the purchase of land.

The Federal Subsistence Homesteads Corporation is authorized to pay a reasonable charge for such evidences of title as may be required by the Attorney General to formulate his opinion as to the validity of the title.

It is not the policy of the United States Government to carry insurance on its property. However, the occupants of the homesteads will have, or will in time acquire, insurable interests, and such interests may properly be insured either by the individuals themselves or by the Corporation acting in their behalf and at their expense.

It is within the province of the United States Employees' Compensation Commission to decide whether employees of the Division of Subsistence Homesteads in Washington and employees of the Federal Subsistence Homesteads Corporation on the various projects in the various States are entitled to the benefit of the United States Employees' Compensation Act; and it is suggested that the matter be handled with the Commission.

The Corporation may make loans for the purchase of livestock, tools, implements, seed, fertilizer, and household furnishings and furniture, or may itself purchase and resell them to the occupants of the homesteads, when determined to be reasonably necessary in order to carry out the purposes of the statute, and assuming that such regulation as may be issued comes within its terms.

DEPARTMENT OF JUSTICE,
July 18, 1934.

SIR: I have the honor to comply with your request of June 18, for my opinion upon the questions hereinafter indicated.

The National Industrial Recovery Act (48 Stat. 195, 205) contains the following section.

"SEC. 208. To provide for aiding the redistribution of the overbalance of population in industrial centers $25,000,000 is hereby made available to the President, to be used

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by him through such agencies as he may establish and under such regulations as he may make, for making loans for and otherwise aiding in the purchase of subsistence homesteads. The moneys collected as repayment of said loans shall constitute a revolving fund to be administered as directed by the President for the purposes of this section."

The President, by Executive Order of July 21, 1933, designated you to exercise in his behalf the powers and functions conferred upon him by this section; and you have caused the Federal Subsistence Homesteads Corporation to be formed, under the laws of Delaware, as a means of carrying out the purposes of the statute and administering, in part, the fund appropriated. The certificate of incorporation provides that the entire capital stock shall be issued to and held by the Secretary of the Interior and his successors in office "in trust for the United States of America, which shall be the sole and only authorized holder of legal title to the stock."

I have previously approved the legality of carrying out subsistence homesteads projects through corporations created for such purpose and have indicated the broad powers conferred by Section 208 of the National Industrial Recovery Act in an opinion of October 4, 1933 [37 Op. 288], concerning the legality of alternative plans then submitted, and in an opinion of March 19, 1934 [37 Op. 465], passing upon certain questions arising in connection with the proposed participation by the United States in a plan for the economic and social rehabilitation of the Virgin Islands. I also call attention to my opinion of February 7, 1934 [37 Op. 437], relating to the Public Works Emergency Housing Corporation, which in part discusses the same subject matter.

The questions submitted by you and my conclusions with respect thereto are hereinafter set forth.

"1. Is the real and personal property owned by Federal Subsistence Homesteads Corporation subject to, or exempt from, taxation by state, county, city and other local taxing authorities?"

Upon the authority of *Clallam County* v. *United States*, 263 U.S. 341, 345, and cases therein cited, I advise you to

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contest the attempted imposition of any such taxes, the question of liability being ultimately for the courts to determine.

"2. If your answer to question 1, is such that property is exempt from local taxation, will Federal Subsistence Homesteads Corporation be able validly to contract with states, counties, cities and other local authorities to pay, in lieu of taxes, such reasonable sums as may be agreed upon as compensation for the use of such services and facilities as are customarily financed by such bodies from ad valorem taxes? We refer to such services as supplying roads, school facilities, police protection, fire protection and the like.

"3. Will the members of the homesteading families living in such subsistence homestead communities, during the time that they are making payments under their contracts and title is held by Federal Subsistence Homesteads Corporation, be entitled to vote in state, county, city, and other local elections?

"4. Will the members of such homesteading families be subject to arrest by local authorities?

"5. Will the members of such homesteading families be generally entitled to the rights and privileges and subject to the duties and obligations of citizens of the city, county and state in which they reside, or will they be 'wards' of the Federal Government?"

I quote for ready reference the following paragraph contained in my opinion of October 4, 1933, *supra;*

"While there may be some proper degree of federal 'supervision,' this cannot amount to a superseding of the authority of the State. The Constitution provides for the exercise of exclusive federal jurisdiction 'over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.' There is no reason for believing that Congress contemplated any such assumption of jurisdiction over lands purchased for sites of subsistence homesteads, even assuming that the state legislatures would give the required consent. It is stated in *Ft. Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525, 527, that when the United States acquires land without such consent the State may continue to exercise with respect

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to such land 'the same authority and jurisdiction which she could have exercised over similar property held by private parties;' and this must be borne in mind when determining the proper function and authority of the Federal Government in connection with land purchased as sites of subsistence homesteads."

In my opinion, the occupants of the homesteads will not be "wards of the Federal Government," in the sense that they are removed from the political status of residents of the State and of the subdivision thereof in which they live, but will be entitled to the rights and privileges, and subject to the duties and obligations, of citizens and will be subject to arrest by local authorities. Their right to vote will depend upon state law.

As citizens and as potential taxpayers (even assuming that there may be at first an absence of privately owned and taxable property), the occupants of the homesteads will be entitled to such police and fire protection as may ordinarily be provided by the state, county or municipality for communities similarly situated; will be entitled to use the public schools and the public roads; and will be entitled to have their needs for such facilities considered by the local authorities in like manner as other citizens.

To the extent that the Corporation must supply a facility it may contract therefor, and there is no disability to contract with a state or other political subdivision for the supplying of a facility which the state or other political subdivision is not otherwise legally obligated to furnish. A precedent for the making of such contracts under somewhat similar circumstances is found in the report of the United States Housing Corporation (1920), v. 1, pp. 349, 358.

"6. Is Federal Subsistence Homesteads Corporation under the necessity of qualifying and registering as a foreign corporation in states other than Delaware when it seeks to enter into a state for the purpose of purchasing land, and entering into contracts with homesteaders as above set forth?"

The Supreme Court, in *Horn Silver Mining Co.* v. *New York*, 143 U.S. 305, 314, announced two exceptions to the rule that a corporation of one state, doing business in another state, is dependent upon the consent of the latter:

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"One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1, 12. The other limitation on the power of the State is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton* v. *Baltimore & New York Railroad*, 32 Fed. Rep. 9, 14. As that learned justice said: 'If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union.' And this court, in citing this passage, added, 'without the permission and against the prohibition of the State.' *Pembina Mining Co.* v. *Pennsylvania*, 125 U.S. 181, 186."

The last cited case had declared that "undoubtedly a corporation of one State, employed in the business of the general government, may do such business in other States without obtaining a license from them."

Butler Bros. Shoe Co. v. *United States Rubber Co.*, 156 Fed. 1, 16, citing the foregoing cases, stated that "Every corporation of any State in the employ of the United States has the right to exercise the necessary corporate powers and to transact the business requisite to discharge the duties of that employment in every other state in the Union without permission granted, or conditions imposed by the latter."

I accept the foregoing as applicable here. *A fortiori* consent of the state is not required when the corporation is owned and controlled, as well as employed, by the United States. The United States Housing Corporation was confronted with the same problem, and, as stated in the report (v. 1, p. 348): "It was finally decided that, being a purely Federal agency, the corporation is not amenable to State regulations applying to ordinary business corporations, and this view has been acquiesced in by the authorities of practically all the States where the question has come up."

I therefore conclude that it is unnecessary for the Federal Subsistence Homesteads Corporation to qualify and register in states other than Delaware.

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"7. Is Federal Subsistence Homesteads Corporation subject to license, franchise, occupation, income and excise taxes?

(a) Levied by the State of Delaware?

(b) Levied by any other State in which it purchases land, builds homestead communities and enters into contracts with homesteading families?"

Preliminary fees or costs assessed by the State of Delaware which are in the nature of charges for services rendered are properly taxable against the Corporation. 18 Op. 491; 23 id. 299. Whether there may be other occasions hereafter when Delaware may levy valid charges of such nature is not before me at this time.

Beyond this, upon the authority of *Williams* v. *Talladega*, 226 U.S. 404, 419; *Metcalf & Eddy* v. *Mitchell*, 269, U.S. 514; *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218; and *De La Vergne Machine Co.* v. *State Tax Commission*, 207 N.Y. S. 680, 684, I advise you, as I have with respect to your first question, *supra*, to contest the attempted imposition of any such taxes, the question of liability being ultimately for the courts to determine.

"8. May Federal Subsistence Homesteads Corporation pay cash to secure binding options on land?"

In my opinion to you of February 7, 1934, I concluded that the Public Works Emergency Housing Corporation might lawfully acquire options as an incident of the purchase of land. The powers of the Federal Subsistence Homesteads Corporation are no less broad in this particular.

"9. May Federal Subsistence Homesteads Corporation retain local attorneys and title companies to prepare abstracts of title, certificates of title, letters of opinion of title, letters of opinion of title and forms of warranty deed, and pay reasonable fees for such services, when such title papers, after they are completed, are to be transmitted to the Office of the Attorney General as the basis for the opinion of title of the Attorney General?"

The Comptroller General, in an opinion of May 3, 1924, (v. 3, p. 569, 571) concluded that appropriations chargeable with the purchase price of land are also available for the payment of a reasonable charge for such evidences of title *as may be required by the Attorney General.* I approve, as

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applicable to the purchase of land by the Federal Subsistence Homesteads Corporation, the principle thus announced, and inclose, for your ready reference, a copy of a circular issued by this Department under date of April 16, 1934; setting forth the general requirements and recommended procedure in land title matters.

"10. May Federal Subsistence Homesteads Corporation carry fire, tornado and other insurance on homestead properties during the time that title remains in the Corporation? May the Corporation carry public liability insurance?"

It is not the policy of the United States Government to carry insurance on its property, which is so extensive and so widely distributed as to render ordinary insurance of doubtful practicability and economy. As to public liability insurance, it is to be remembered that the Government's liability differs materially from that of an individual or a private corporation. However, the occupants of the homesteads will have, or will in time acquire, insurable interests, and such interests may properly be insured either by the individuals themselves or by the Corporation acting in their behalf and at their expense.

"11. Are employees of the Division of Subsistence Homesteads in Washington, and employees of Federal Subsistence Homesteads Corporation on the various projects in the various states entitled to the benefits of the United States Employees' Compensation Act?"

It appears that this question is more properly for consideration by the United States Employees' Compensation Commission. 31 Op. 252; 34 id. 120; 34 id. 363. In the first mentioned opinion the Attorney General concluded that it was within the province of the Commission "to decide whether employees of the United States Shipping Board Emergency Fleet Corporation, or other persons, are entitled to the benefits of the provisions of the act"; and in the two later opinions he interpreted the Act, upon request of the Commission through the President, as applied to particular employees of the Fleet Corporation.

I therefore respectfully suggest that you handle the matter with the United States Employees' Compensation Commission.

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"12. In the event that the Secretary of the Interior should promulgate a regulation that livestock, tools, implements, seed, fertilizer, and household furnishings and furniture are to be included within the definition of a 'subsistence homestead,' will Federal Subsistence Homesteads Corporation be empowered, under such regulation, to make loans for the purchase of these items, or to purchase them and re-sell them on credit to homesteaders?"

It is necessarily true that some of the aided families will be without certain of the articles enumerated and will be without financial means to supply them. To place them thus within four bare walls and on an uncultivated plot of ground would conceivably fall short of providing "subsistence homesteads" which they are to occupy and which they are to be assisted in holding and acquiring as their own property. I therefore conclude that the Corporation may make loans for the purchase of the items named, or may itself purchase and resell them to the occupants of the homesteads, when determined to be reasonably necessary in order to carry out the purposes of the statute, and assuming that such regulation as may be issued comes within its terms.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

CITIZENSHIP OF CHILD BORN ABROAD OF AN AMERICAN AND AN ALIEN PARENT

A child born abroad subsequently to May 24, 1934, one of whose parents is a citizen of the United States and the other an alien, acquires American citizenship at birth. Such citizenship is subject to being divested if such child thereafter fails to comply with the two conditions prescribed in section 1 of the Act of May 24, 1934, 48 Stat. 797, which must be regarded as conditions subsequent and not as conditions precedent.

DEPARTMENT OF JUSTICE,
July 21, 1934.

SIR: I have the honor to respond to your request of May 29, 1934, for my opinion concerning the construction of Section 1 of the Act of May 24, 1934 (Public No. 250), which

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amended Section 1993 of the Revised Statutes dealing with the citizenship status of children born abroad of American parents.

Section 1 of Public No. 250 (48 Stat. 797), is as follows:

That section 1993 of the Revised Statutes is amended to read as follows:

"SEC. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

The question presented in your request for an opinion is "whether a child born abroad of an American and alien parent is to be regarded as an American citizen at birth or whether such citizenship attaches only after the child has resided in the United States five years immediately preceding its eighteenth birthday and has taken the oath of allegiance within six months following its twenty-first birthday."

In other words, does a child born abroad of one American and one alien parent acquire citizenship by birth, on conditions subsequent, i.e., subject to defeasance in the event that he fails to come to the United States and reside therein for at least five years continuously immediately previous to his eighteenth birthday or fails within six months after his twenty-first birthday to take an oath of allegiance to the United States; or are the foregoing requirements to be regarded as conditions precedent to the child's acquiring American citizenship, so that such a child is born an alien, but may become an American citizen at the age of twenty-one if he has complied with these prerequisites?

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At the outset, it seem desirable to recall some basic, fundamental principles of statutory construction applicable to the question under discussion.

In *United States* v. *Chase*, 135 U.S. 255, 261, the court recognized the principle that statutes should be construed with reference to the evil they are designed to suppress as an important aid in ascertaining the meaning of language which is ambiguous and equally susceptible of conflicting constructions. A law is to be construed so as to give effect to the object designed and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. *In Re Ross*, 140 U.S. 453, 475; *Cherokee Intermarriage Cases*, 203 U.S. 76, 89.

In *Helvering* v. *New York Trust Company* decided by the Supreme Court on May 28, 1934, the court made the following illuminating observations on the canons of statutory interpretation:

"But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown* v. *Duchesne*, 19 How. 183, this court said (p. 194): 'It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' Quite recently in *Ozawa* v. *United States*, 260 U.S. 178, we said (p. 194): 'It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.'" 292 U. S. 455, 464.

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It is, therefore, necessary to review briefly the antecedent history leading to the enactment of the Act of May 24, 1934.

The preexisting law is found in Section 1993 of the Revised Statutes (U. S. Code, Title 8, Sec. 6), which was derived from the Act of February 10, 1855 (10 Stat. 604), and reads as follows:

"All children born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States."

The foregoing was the law of the United States continuously from February 10, 1855, until May 24, 1934. A child born abroad whose father at the time of the child's birth was a citizen of the United States was an American citizen by birth. The only limitation upon such transmission of citizenship is found in the provision that the right of citizenship should not descend to children whose fathers never resided in this country. In *Weedin* v. *Chin Bow*, 274 U.S. 657, it was held that citizenship attaches to such a child from birth only where the father has resided in the United States before the birth of the child. That case, however, does not throw any light upon the problem here under consideration.

A child born of an American father in a foreign country such as Great Britain, which recognized the *jus soli*, necessarily was endowed with dual citizenship at birth. Thus, he might be a citizen both of the United States and of Great Britain. That situation gave rise to no difficulty for dual citizenship is a concept well known to international law. Upon attaining his majority, the child was in a position to elect the country whose citizen he would continue to remain. 3 Moore's Digest of International Law, 518; 1 Oppenheim on International Law, 542.

Prior to 1922, an American woman who married an alien lost her American citizenship. Consequently, the provision as to children born abroad whose fathers may be at the time of their birth citizens of the United States, was sufficiently broad to cover all children born abroad one of whose par-

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ents was an American citizen, since it was impossible for a mother to be an American citizen while the father was an alien. The situation was radically changed by the so-called Cable Act (Act of September 22, 1922, 42 Stat. 1022; U.S. Code, Title 8, Sec. 9). That enactment provided that a woman citizen of the United States should not cease to be such citizen by reason of her marriage. Thus, since 1922 women have acquired a citizenship status independent of that of their husbands. As a result, married couples where the husband is an alien and the wife is an American citizen, were no longer legally impossible.

Placing the foregoing provision of the Cable Act in juxtaposition with Section 1993 of the Revised Statutes leads to the conclusion that a child born in a foreign country whose father was an American citizen and whose mother was an alien, acquired American citizenship at birth; but a child born abroad whose father was an alien and whose mother was an American citizen was born an alien.

The purpose of Section 1 of the Act of May 24, 1934, was to confer upon mothers who were American citizens the same right to transmit American citizenship to their children as was possessed by fathers. In other words, its purpose was to continue the policy of equalizing the citizenship rights between the two sexes, which was first undertaken in the Cable Act of 1922. Manifestly, the equalization of the rights of fathers and mothers to transmit citizenship to children born abroad, was not to be attained by depriving a citizen father of the rights that he theretofore had, but by granting to citizen mothers the same rights theretofore possessed by citizen fathers.

Yet if the second sentence of Section 1 of the Act of May 24, 1934, is to be construed as providing that a child born abroad of one citizen parent and one alien parent shall not become an American citizen until he fulfills certain conditions and attains the age of twenty-one, the effect of such an interpretation will be to deprive citizen fathers of the right to transmit citizenship to their children born abroad—a right which has been theirs continuously since 1855. If such a child is to be regarded as being born an alien, he is subject to exclusion under the Immigration Laws if his parents at-

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tempt to bring him to the United States. That an American citizen having a child born abroad may be precluded from bringing him into this country seems so abhorrent to our natural instincts that an intention to accomplish such a harsh result should not be imputed to Congress unless it is expressed in clear and unmistakable language. If barred from entry into the United States, such a child may never be in a position to comply with the requirements of the Act and thereby attain the very privilege of citizenship which the law would confer upon him. In many states such a child, as an alien, would not be in a position to take title to real estate and would, therefore, be prevented from inheriting real property even from his own father or mother. If admitted to this country, he would be subject to all of the disabilities of an alien until he reached his majority.

In *Church of the Holy Trinity* v. *The United States*, 143 U.S. 457, the Supreme Court went as far as to depart from the literal construction of an unambiguous statutory provision in order to avoid a harsh and absurd result. The same thing was recently done in *Helvering* v. *New York Trust Company*, *supra*. In the present instance it is not necessary to resort to such an extreme measure in order to reach a reasonable construction of the act consonant with the purpose and intent of the Congress.

A study of the legislative history of the statute convincingly supports the view that the purpose of Congress was to equalize the rights of men and women in respect of transmitting citizenship to their children born abroad, by conferring upon women the same rights that had been theretofore lodged in men—not by depriving men of the rights which they had theretofore possessed. The hearing before the Committee on Immigration and Naturalization of the House of Representatives (73d Congress, 1st Session; Hearing No. 73.1.1, Mar. 28, 1933) on H.R. 3673—the bill which matured into the Act of May 24, 1934—record the appearance of a number of representatives of various organizations of women urging that the provisions of Section 1993 of the Revised Statutes be extended so as to apply to the children of American mothers. The report of the House Committee (73d Congress, 1st Session, House Report No. 131)

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stated that "the purpose of the bill is to complete the provisions of the Cable Act of 1922 so as to establish complete equality between American men and women in the matter of citizenship for themselves and for their children."

When the bill was debated on the floor of the House of Representatives, Congressman Dirksen, a member of the committee in charge of the bill, who opened the discussion, stated that the object of the measure was to give the mother of a child that is born outside of the United States the same right to transmit citizenship to that child that is possessed by the father (Congressional Record, Vol. 78, p. 20771). While Congressman Dickstein, the Chairman of the Committee, stated in answer to a question directed to him on the floor that a child born abroad of one American parent and one alien parent is born an alien and may acquire citizenship only in compliance with the conditions proposed in the bill (Congressional Record, Vol. 78, p. 73421), it is quite apparent that that view was not shared by other members of the committee. Thus it was remarked by Congressman Taylor that "if it has been deemed wise that the protection and privileges of our Government should be extended to the children of American fathers, it would seem to be extraordinary that the same principle should not apply to the children of American mothers." (Id. p. 7332).

When the bill came before the Senate, Senator Thomas of Utah stated that (Congressional Record, Vol. 78, p. 8470):

"As the bill is drafted, it is rather impossible to tell with certainty whether the child during his first 21 years is an alien or a citizen; this applies to a case of a foreign-born child, only one of whose parents is a citizen."

Accordingly, he proposed a substitute explicitly providing that a child born outside of the United States whose father and mother were citizens should be a citizen from birth; and that any such child, one of whose parents was a citizen and the other an alien, might become a citizen upon complying with the conditions prescribed in the Act. The Senator stated that under his substitute such a child would clearly be born an alien.

Speaking in opposition to the substitute, Senator O'Mahoney stated that under the pending bill, "the child becomes

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a citizen at birth but such citizenship is subject to defeasance by the omission of the child to reside in the United States or to take the oath." (Congressional Record, vol. 78, p. 8471.)

Senator Thomas' substitute was defeated. It is quite apparent, therefore, that the Senate did not intend to adopt a provision which would have the effect of preventing such a child from being born a citizen but that it evidently adopted the view of Senator O'Mahoney that under the bill the child becomes a citizen at birth and that such citizenship might be divested if the child failed to fulfill the prescribed conditions.

The phraseology of the Act, though perhaps not as clear as might be desirable, leads to the same conclusion. The first sentence in clear and unmistakeable language provides that any child hereafter born outside of the United States, whose *father or mother or both* at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States. This is a sweeping, unequivocal pronouncement apparently subject to no limitation or qualification. To construe the second sentence of the section as meaning that a child, only one of whose parents is a citizen, does not acquire citizenship at birth is at least partially to negative and destroy the grant of citizenship contained in the first sentence. On the other hand, if the second sentence be interpreted as containing conditions subsequent upon which the citizenship may become divested, full effect would be given to the entire section. In *Petri* v. *Commercial Bank*, 142 U.S. 644, 650, Mr. Chief Justice Fuller stated that "the rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another, is well settled". Chief Justice Marshall in *Postmaster General* v. *Early*, 12 Wheat. 136, 152 stated that "the whole law is to be taken together, and one part expounded by any other, which may indicate the meaning annexed by the legislature itself to ambiguous phrases". Similarly, it has been stated that it is a settled rule of construction that one part of a statute must be so construed by another that the whole may, if possible, stand. *United States* v. *Landram*, 118 U.S. 81, 85.

It is, therefore, my opinion that a child born abroad subsequently to May 24, 1934, one of whose parents is a citizen of

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the United States and the other an alien, acquires American citizenship at birth. Such citizenship is subject to being divested if such child thereafter fails to comply with the two conditions described in the Act, which must be regarded as conditions subsequent and not as conditions precedent.

Respectfully submitted.

HOMER CUMMINGS.

To the SECRETARY OF STATE.

REFINANCING AN INDEBTEDNESS AGAINST COTTON ACQUIRED UNDER THE AGRICULTURAL ADJUSTMENT ACT

Relative to the proposed plan of the Secretary of Agriculture, herein described, for refinancing an indebtedness of $100,000,000 outstanding against approximately 2,000,000 bales of cotton acquired under the provisions of the Agricultural Adjustment Act, *held* that the Secretary is authorized to make the proposed loan and that he may re-pledge the cotton to secure the loan thus obtained.

The proposed form of the note to be used by the Secretary of Agriculture in connection with said refinancing plan is without legal objection.

DEPARTMENT OF JUSTICE,
July 28, 1934.

SIR: I have your letter of July 25, 1934, and enclosures, setting forth the facts relative to the proposed plan for refinancing an indebtedness of $100,000,000 outstanding against approximately 2,000,000 bales of cotton acquired by the Secretary of Agriculture under the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31).

Under the authority of section 4 of the Agricultural Adjustment Act, the Secretary of Agriculture borrowed approximately $60,000,000 from commercial banks at the rate of 6¢ per pound on approximately 2,000,000 bales of cotton, giving notes for the amount borrowed and pledging the cotton as security by depositing warehouse receipts covering the cotton with the Federal Reserve Bank at Atlanta, New Orleans branch, as custodian. The notes mature July 31, 1934.

On January 8, 1934, for the purposes outlined in your letter, the Secretary of Agriculture with the consent of the producers, who, by reason of participation in the acreage reduction program, held options upon the cotton, established a cotton pool under the management of a pool manager,

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who, pursuant to the authority given him under the pool agreement borrowed $40,000,000 from the Commodity Credit Corporation at the rate of 4¢ per pound on the said cotton. The obligation was evidenced by notes of the pool manager drawn in favor of the Commodity Credit Corporation and secured by a pledge of the cotton subject to the prior pledge made by the Secretary of Agriculture. The notes also mature July 31, 1934.

In order to protect the title to and the right of possession of this cotton and to effect a reduction in interest charges, the Secretary of Agriculture now proposes to borrow from commercial banks, under an existing arrangement, $100,000,000 at an interest rate of one-half of one per cent per annum, in order to refinance the loan of $60,000,000 and to advance to the Pool Manager $40,000,000 for payment of the notes held by the Commodity Credit Corporation.

You request my opinion upon the following questions:

1. Are the provisions of Section 4 of the Agricultural Adjustment Act, as amended, sufficient to authorize the Secretary of Agriculture to carry out the program above outlined?

2. Is the form of the note which the Secretary of Agriculture proposes to give to the commercial banks in proper authorized form?

It is indicated that there is doubt as to the Secretary's authority to make the proposed advance to the Pool Manager under the provisions of Section 4 of the Agricultural Adjustment Act, as amended by the Act of June 19, 1934 (Public No. 412, 73d Congress). That section is in part as follows:

"SEC. 4. (a) The Secretary of Agriculture shall have authority to borrow money upon all cotton in his possession or control and may, at his discretion, deposit as collateral for such loans the warehouse receipts for such cotton.

"(b) The Secretary of the Treasury is authorized to advance, in his discretion, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available, until March 1, 1936, to the Secretary of Agriculture, for paying off any debt or debts which may have been or may be incurred by the Secretary of Agriculture and discharging any lien or liens which may have arisen or may

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arise pursuant to part 1 of this title, for protecting title to any cotton which may have been or may be acquired by the Secretary of Agriculture under authority of part 1 of this title, and for paying any expenses (including, but not limited to, warehouse charges, insurance, salaries, interest, costs, and commissions) incident to carrying, handling, insuring, and marketing of said cotton and for the purposes described in subsection (e) of this section.

* * * * *

"(e) The Secretary of Agriculture is authorized to use in his discretion any funds obtained by him pursuant to the provisions of subsection (a) or (b) of this section or of section 5 for making advances to any agency which may have been or may be established by the Secretary of Agriculture for the handling, carrying, insuring, or marketing of any cotton acquired by the Secretary of Agriculture, to enable any such agency to perform, exercise, and discharge any of the duties, privileges, and functions which such agency may be authorized to perform, exercise, or discharge." (48 Stat. 1058).

It is to be noted that subsection (a) authorizes the Secretary of Agriculture to borrow money upon all cotton either in his possession or under his control. It is clear that the cotton is not at this time in the possession of the Secretary, but it is equally clear from your submission that it is under his control.

Under the terms of the Cotton Option and Pool Agreement, the Pool Manager can neither pledge nor sell the cotton without the approval of the Secretary of Agriculture. From this it follows that the Secretary has effectively retained control of the cotton within the meaning of the statute and, is, therefore, fully authorized to make the proposed loan.

Under subsection (e) the Secretary of Agriculture is authorized to use any funds obtained by him pursuant to the provisions of subsections (a) and (b) for making advances to any agencies established for the handling, carrying, insuring, or marketing of any cotton acquired by the Secretary of Agriculture to enable any such agency to perform, exercise, and discharge any of the duties, privileges, and functions authorized. The cotton pool is an agency established

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for the purpose of handling and carrying cotton, and since the Pool Manager is specifically authorized to make loans and to pledge the cotton, with the approval of the Secretary, it is my opinion that the Secretary is authorized to make the proposed advance to the Pool Manager and that he may re-pledge the cotton to secure the loan thus obtained.

Relative to the second question submitted by you, it is my opinion that the proposed form of note to be used in connection with the refinancing plan is without legal objection. It is suggested by your Solicitor that there may be some doubt as to your authority to pledge the credit of the United States for any deficiency which may result in the event that the proceeds from the cotton when sold are not sufficient to pay the indebtedness in full. The statute specifically authorizes the Secretary of Agriculture to borrow money upon all cotton in his possession or control, and the Congress has thus authorized you to pledge the credit of the United States for the amount borrowed. The indebtedness to be evidenced by the notes is that which has been incurred by borrowing upon the cotton involved, and it is therefore within the authorization of the statute.

Your questions are answered accordingly.

Respectfully,

WILLIAM STANLEY,
Acting Attorney General.

To the SECRETARY OF AGRICULTURE.

AVAILABILITY OF CERTAIN FUNDS FOR CONTROL OF JAPANESE BEETLE INFESTATION AT ST. LOUIS, MO.

The facts stated show that the Japanese Beetle infestation in St. Louis, Mo., is a menace to the agricultural area of the Mississippi Valley and west thereof stricken by drought.

Held, the appropriation of $525,000,000 made by the Emergency Appropriation Act, fiscal year 1935, "to meet the emergency and necessity for relief in stricken agricultural areas" is available for the control of such infestation. (See Executive Order No. 6820 of August 11, 1934.)

DEPARTMENT OF JUSTICE,
August 10, 1934.

SIR: I am herewith transmitting, through the Secretary of the State, a revised draft of a proposed Executive Order presented by the Acting Secretary of Agriculture and sub-

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mitted to this Department by the Acting Director of the Bureau of the Budget under date of August 3, 1934. The original draft of the order has been revised slightly as to form but the sense has in no wise been changed.

The proposed order allocates the sum of $65,000 to the Secretary of Agriculture from the emergency relief appropriation of $525,000,000 contained in the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934, for the control of the Japanese beetle infestation at St. Louis, Missouri. The question is presented as to whether the item of $525,000,000 is available for the purpose stated.

The pertinent part of the appropriation Act in question is as follows:

"To meet the emergency and necessity for relief in stricken agricultural areas, to remain available until June 30, 1935, $525,000,000, to be allocated by the President to supplement the appropriations heretofore made for emergency purposes * * *" (48 Stat. 1056).

Although the Japanese beetle infestation in question is localized in the City of St. Louis, Missouri, control of the infestation, as stated by the Acting Secretary of Agriculture in his letter to you of August 1, 1934, is necessary in order to prevent it from spreading into and further damaging the agricultural area of the Mississippi Valley and west thereof which has been stricken by drought. It is to be noted in this connection that the use of the appropriation is not limited to the relief of conditions caused by drought but is available for meeting "the emergency and necessity for relief in stricken agricultural areas." Thus conditions justifying relief under the Act might also be brought about by such forces as floods, storms, disease, plague, pest, etc.

There can be no doubt that if the agricultural area in question were already stricken by a Japanese beetle infestation the appropriation would be available for the control thereof in such area. The actual situation presented, however, cannot be distinguished in principle from the one supposed. The menace of the infestation in the non-agricultural St. Louis area has in fact created an emergency in the contiguous agricultural area sought to be protected; hence the removal or control of that menace is within the purpose of the act as expressed in the language thereof. If the

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appropriation is available for relief of conditions caused by pestilence, by force of reasoning it must be said to be available also for the prevention of such conditions.

Accordingly, it is my view that you are authorized to issue the proposed executive order.

Respectfully,

WILLIAM STANLEY,
Acting Attorney General.

To the PRESIDENT.

PAYMENT OF ADMINISTRATIVE EXPENSES IN CONNECTION WITH SETTLEMENT OF WAR CLAIMS ACT OF 1928, ETC.

Public Resolution No. 53, Seventy-third Congress, postponing payments of awards of the Mixed Claims Commission while Germany is in arrears under the debt-funding agreement of June 23, 1930, does not restrict payment of administrative expenses pursuant to paragraph (1) of section 4 (c) of the Settlement of War Claims Act of 1928, or payment by the Treasury Department of sums out of the Alien Property Custodian administrative expense fund.

DEPARTMENT OF JUSTICE,
August 17, 1934.

SIR: I have the honor to refer to the letter of Mr. L. W. Robert, Jr., Acting Secretary of the Treasury, dated August 10, 1934, wherein he requests the opinion of the Attorney General "on the question of whether Public Resolution No. 53, 73rd Congress, approved June 27, 1934, in any way restricts payment of administration expenses pursuant to paragraph (1) of Section 4 (c) of the Settlement of War Claims Act of 1928, or the payment by the Treasury Department to the Department of Justice, as the successor to the rights of the Alien Property Custodian, of sums out of the administrative expense fund consisting of the 2 per cent deducted at the time claims are paid by the Alien Property Custodian, which fund is a part of the No. 6 account of the Alien Property Custodian with the Treasury Department."

Resolution No. 53, so far as material here, is as follows:

"That so long as Germany is in arrears in any payments of principal or interest, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Ger-

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many and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: *Provided, however,* That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement of War Claims Act of 1928, as amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this resolution: *Provided, further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution: *And provided further,* That the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described, and his determination thereof shall not be subject to judicial review" [48 Stat. 1267, 1268].

It is to be noted that the Resolution does not expressly prohibit or direct the payment of administrative expenses; in fact, it is silent on the subject. It does, however, direct that all payments be postponed and that all money and other property be reserved. To carry out this direction obviously requires administration. The resolution further directs the payment of awards made by the Mixed Claims Commission, and it authorizes the President, in his discretion, to remove the restrictions as to payment in any case, and to determine the period or periods in which Germany is in

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arrears. Clearly, payment of awards of the Mixed Claims Commission cannot be made, nor can the authority vested in the President be exercised by him, without administration of the funds and other property in question. Administration necessarily requires funds with which to defray expenses.

The Congress has made no provision, by appropriation or otherwise, for the payment of administrative expenses other than the provisions of law in force at the time Resolution No. 53 was adopted. Since the Congress had previously provided for administrative expenses, it may be presumed that that body knew that funds therefor are necessary. It is inconceivable that the Congress intended administration to be carried on without funds, and to impute such an intention to the Congress would produce an absurd result. In my opinion, such a construction may not be properly placed on the Resolution.

Considering the language of Resolution No. 53 as a whole in the light of the foregoing, it is my opinion that the Resolution does not in anywise restrict the payment of administrative expenses. The question presented is therefore answered in the negative.

Respectfully,

WILLIAM STANLEY,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

RELEASE OF AMERICAN LEGION POSTS AND THEIR SURETIES FROM CLAIMS RESULTING FROM LOSS OF PROPERTY LENT PURSUANT TO ACT OF FEBRUARY 10, 1920, AS AMENDED

The Act of May 29, 1934, Public No. 265, Seventy-third Congress, has the effect of releasing and canceling as to both principal and surety all claims existing prior to passage of that act and resulting from loss of property lent to American Legion Posts pursuant to the act of February 10, 1920, as amended.

DEPARTMENT OF JUSTICE,
August 20, 1934.

SIR: I have the honor to refer to your letter of July 25, 1934, in which you request the opinion of the Attorney General as to whether the Act of May 29, 1934 (Public, No. 265,

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73d Congress; [48 Stat. 815]), has the effect of releasing all claims arising prior to the passage of this act on account of property lent to American Legion Posts pursuant to the act of February 10, 1920 (ch. 64, 41 Stat. 403), as amended by the act of June 5, 1920 (ch. 240, 41 Stat. 976), and subsequently lost, bonds having been given by the posts for the return of such property. In this connection you refer to the various claims against Lloyds Insurance Company of America filed by the Government with the Insurance Department of the State of New York in the liquidation proceedings involving that company.

The Act of February 10, 1920, as amended by the Act of June 5, 1920, under the authority of which the property here involved was lent to American Legion Posts is as follows:

"That the Act entitled 'An Act authorizing the Secretary of War to loan Army rifles to posts of the American Legion,' approved February 10, 1920, be, and the same is hereby, amended to read as follows:

"'That the Secretary of War is hereby authorized, under rules, limitations, and regulations to be prescribed by him, to loan obsolete or condemned Army rifles, slings, and cartridge belts to posts or camps of organizations composed of honorably discharged soldiers, sailors, or marines, for use by them in connection with the funeral ceremonies of deceased soldiers, sailors, and marines, and for other post ceremonial purposes; * * * *Provided, however*, That not to exceed ten such rifles shall be issued to any one post or camp.'"

Under the authority of and pursuant to the above-quoted statute, the War Department issued a regulation providing for the issue of the property in question upon execution of proper bond. The regulation is as follows:

"Issue of the above property will be directed by the proper department or corps area ordnance officer, United States Army, to the individual, post or camp upon the filing of a bond by such organization, approved by the State commander or other proper authority, in the penal sum of the value of the property, and providing that said organization guarantees to take proper care of and safely keep and ac-

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count for the arms and accessories issued to it, and shall, when required by the Secretary of War, duly cause the return of said property in good order within 30 days to such arsenal or depot as the Secretary of War may designate to receive them."

The Act of May 29, 1934, provides:

"That the Secretary of War is authorized and directed to give to each post of the American Legion to which obsolete or condemned Army rifles, slings, or cartridge belts have been loaned under authority of the Act entitled 'An Act authorizing the Secretary of War to loan Army rifles to posts of the American Legion', approved February 10, 1920, as amended, any such equipment now held by such post, and to cancel and release all obligations to the United States incurred pursuant to such Act in connection with loans of such equipment to posts of the American Legion" [48 Stat. 815].

The language of this statute is clear and unambiguous. It directs the Secretary of War "to give" to American Legion Posts the property *held* by them and "to cancel and release all obligations to the United States" incurred by such posts in connection with loans of such property.

When property so held is given to a post by the Secretary of War as directed by the statute, no further action is required to satisfy the obligation of the post to return the property. Hence, unless the language of the statute "to cancel and release all obligations to the United States incurred pursuant to such Act in connection with loans of such equipment to posts of the American Legion" includes obligations arising by reason of failure or inability to return property because of loss thereof, it is superfluous. This language is broad enough to include such obligations, and applying the rule that each and every word of a statute is to be given effect if possible, it is my opinion that this statute has the effect of releasing and cancelling all claims existing prior to the passage of the act that have resulted from loss of property covered by a bond of an American Legion Post.

In view of the rule that the release of the principal operates to release the surety (*Cage* v. *Cassidy*, 23 How. 109;

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National Surety Co. v. *George E. Breece Lumber Co.*, 60 F. (2d) 847, 851), and since there is nothing in the statute to indicate that the Congress intended any different rule to apply in this case, it is my further opinion that the statute has the effect of cancelling and releasing all claims against surety companies such as those filed by the Government in the liquidation proceedings involving Lloyds Insurance Company of America.

Respectfully,

J. CRAWFORD BIGGS,
Acting Attorney General.

To the SECRETARY OF WAR.

AVAILABILITY OF CERTAIN FUNDS FOR THE PROMOTION OF HEALTH SERVICE IN RURAL AREAS

A proposed executive order allocates to the Secretary of the Treasury from the appropriation of $899,675,000 contained in the Emergency Appropriation Act, fiscal year 1935, $1,000,000 for use in enabling the Public Health Service to cooperate with and assist local state health officers in the establishment and promotion of adequate health service in rural areas.

Held, the proposed allocation is authorized under the said Emergency Appropriation Act for carrying out the purposes of the Federal Emergency Relief Act of 1933.

DEPARTMENT OF JUSTICE,
August 22, 1934.

SIR: I am herewith transmitting through the Secretary of State, as required by Executive Order No. 6247 of August 10, 1933, a revised draft of a proposed Executive Order submitted by the Acting Director of the Bureau of the Budget under date of August 17, 1934, allocating to the Secretary of the Treasury from the appropriation of $899,675,000 contained in the Emergency Appropriation Act, fiscal year 1935 (Public No. 412, 73d Congress [48 Stat. 1055]), approved June 19, 1934, the sum of $1,000,000 for use in enabling the Public Health Service to cooperate with and assist local state health authorities in the several states in the establishment, development, and maintenance of adequate health service in rural areas.

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The Treasury Department first suggested that the allocation is authorized as a public works project under section 202(c) of Title II of the National Industrial Recovery Act (ch. 90, 48 Stat. 195, 201), which is as follows:

"The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: * * * * (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public."

Upon the informal suggestion of this Department that considerable doubt existed as to whether the proposed allocation is authorized under section 202(c), the Treasury Department expressed the view that the allocation might be authorized from the same appropriation as a relief measure for carrying out the purposes of the Federal Emergency Relief Act of 1933 (ch. 30, 48 Stat. 55).

The general purpose of that Act is broadly indicated in the first section thereof which is as follows:

"That the Congress hereby declares that the present economic depression has created a serious emergency, due to widespread unemployment and increasing inadequacy of State and local relief funds, resulting in the *existing* or *threatened* deprivation of a considerable number of families and individuals of the necessities of life, and making it imperative that the Federal Government cooperate more effectively with the several States and Territories and the District of Columbia in furnishing relief to their needy and distressed people." [Italics mine.]

Section 4(b) of the Act authorizes the Federal Emergency Relief Administrator to make grants to the several states for the purposes set out in section 4(a) which are:

"* * * to aid in meeting the costs of furnishing relief and work relief and in relieving the hardship and suffering caused by unemployment in the form of money, service, materials, and/or commodities to provide the necessities of life to persons in need as a result of the present emergency, and/or to their dependents, whether resident, transient, or homeless."

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The character of the service authorized by the proposed order is indicated by the following excerpt from the enclosed memorandum of August 21, 1934, submitted to this Department by the Surgeon General of the United States:

"* * * Much of the activity of the county health units would be concerned with service to the poor ordinarily rendered by physicians. Such service would include the maintenance of diagnostic clinics, the administration of vaccines for the prevention of diphtheria, typhoid fever and the like, medical advice to indigent pregnant mothers, medical advice on the care of infants and the medical examination of school children. The work would be directed largely to protection of the health of persons unable to pay for medical service, and in this way would relieve distress by preventing disease which would require medical care beyond the means of the poor. In this way, the Federal government would be relieved of at least a part of the much heavier expense of rendering actual medical service to the indigent sick."

It thus appears that the contemplated service will provide necessities of life to persons in need as a result of the emergency, and also that it will tend to prevent conditions requiring further direct relief. The rendition of such service is, therefore, within the scope of the Federal Emergency Relief Act.

The fact that a regular appropriation exists for the same purpose as that of the proposed allocation does not affect the validity of the contemplated action. The test is whether the allocation is made for a purpose within the Federal Emergency Relief Act.

The appropriation of $899,675,000 made by the Emergency Appropriation Act to carry out the provisions of the Federal Emergency Relief Act of 1933, and certain other Acts, is to be allocated for such purposes by the President. The authority of the President to allocate the funds necessarily implies that allocations may be made to any persons or agencies whom he may, in his discretion, designate. Hence, it follows that the President is authorized to select the Secretary of the Treasury as an agent to administer relief funds appropriated by the Emergency Appropriation

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Act. It is my opinion, therefore, that the President is authorized to make the proposed allocation.

The Acting Director of the Bureau of the Budget objects to those provisions of the order which authorize the Secretary of the Treasury to appoint and fix the compensation of officers and employees without regard to the Civil Service laws and the Classification Act of 1923, as amended. [46 Stat. 1003.] Since the appropriation in question is to be allocated in the discretion of the President for carrying out the purposes of the Federal Emergency Relief Act, etc., the President is fully empowered to confer such authority upon the Secretary of the Treasury.

The draft submitted by the Acting Director of the Bureau of the Budget has been revised so as to indicate that the proposed allocation is to be used in carrying out the purposes of the Federal Emergency Relief Act of 1933, rather than the National Industrial Recovery Act. The other changes made relate to matters of form only. As revised, the proposed order has my approval as to form and legality.

Respectfully,

J. CRAWFORD BIGGS,
Acting Attorney General.

To the PRESIDENT.

CONSTRUCTION OF SUBSISTENCE HOMESTEADS WITH FUNDS APPROPRIATED THEREFOR BY THE NATIONAL INDUSTRIAL RECOVERY ACT

The Federal Subsistence Homesteads Corporation is authorized to expend money appropriated under section 208 of the National Industrial Recovery Act for the construction of subsistence homesteads without the consent of the state in which such construction is to take place.

DEPARTMENT OF JUSTICE,
August 23, 1934.

SIR: I have the honor to comply with your request of August 20 for my opinion whether the Federal Subsistence Homesteads Corporation may expend money appropriated under Section 208 of the National Industrial Recovery Act for the construction of subsistence homesteads without the consent of the State wherein such construction is to take

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place, in view of the following provision contained in Section 355 R. S. (U. S. C., Title 40, Sec. 255):

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. The district attorneys of the United States, upon the application of the Attorney-General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the Secretaries of the Departments, upon the application of the Attorney-General, shall procure any additional evidence of title which he may deem necessary, and which may not be in the possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments respectively."

As pointed out by Attorney General Bates, (10 Op. 34, 38) consent by the States is not necessary to the acquisition of valid title by the United States, and is important only in the matter of jurisdiction because of the constitutional provision that the United States shall exercise exclusive jurisdiction "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

This principle was recognized in the opinions to you of October 4, 1933 [37 Op. 288], and July 18, 1934, in which it was expressly concluded that Congress did not contemplate the assumption of exclusive jurisdiction over land purchased for resale to private persons as subsistence homesteads sites, yet, of course, Congress did authorize the purchase of such land and did authorize the expenditure of money thereon; and such authority, to the extent of any conflict, must prevail over earlier general requirements.

In the opinion to you of February 7, 1934 [37 Op. 437], concerning the acquisition of lands by the Public Works

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Emergency Housing Corporation, it was concluded that Section 355 R. S. applied and required "the written opinion of the Attorney General * * * in favor of the validity of the title;" and both your Department and mine have acted upon the assumption that such approval of title is required also in connection with lands purchased for the erection of subsistence homesteads, as indicated in the opinion of July 18, 1934. This, however, presents no conflict with the view that consent by the States is not required. Valid title is no less important because resale to private individuals is contemplated and there is no apparent reason for implying in the National Industrial Recovery Act an intent to depart from the provision of Section 355 R. S. relating to approval of title by the Attorney General, as distinguished from the separable provision relating to consent by the States.

Considering the foregoing, it is my opinion that the Federal Subsistence Homesteads Corporation is authorized to expend money appropriated under Section 208 of the National Industrial Recovery Act for the construction of subsistence homesteads without the consent of the State wherein such construction is to take place.

Respectfully,

J. CRAWFORD BIGGS,
Acting Attorney General.

To the SECRETARY OF THE INTERIOR.

CONSTRUCTION OF CIVIL SERVICE RULE IX, GOVERNING REINSTATEMENT

The Civil Service Commission is not authorized under Civil Service Rule IX, governing reinstatement, to apply the law of apportionment in the reinstatement of persons to the apportioned service but may disregard such law in such reinstatement.

An employee whose name is removed from the apportioned and non-apportioned registers upon his acceptance of an appointment to a non-apportioned position may be accorded a status of eligibility for reinstatement to a position in the apportioned service as of the date his vacated position was reached on the register.

DEPARTMENT OF JUSTICE,
August 25, 1934.

SIR: I have received a communication from your Assistant Secretary, Mr. Marvin H. McIntyre, enclosing a letter

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from the Civil Service Commission submitting a question arising in the administration of Civil Service Rule IX, upon which the opinion of the Attorney General is requested.

The Commission's question is as follows:

Whether under the existing Civil Service Rule IX governing reinstatement, the Civil Service Commission has authority to apply the law of apportionment, in any case of proposed reinstatement to the apportioned service, when the person proposed for such reinstatement had formerly served in the apportioned service, or under Opinion of the Attorney General of June 10, 1932 [37 Op. 15], could be regarded as having a status for transfer or original appointment at some time to the apportioned service, and was otherwise eligible under the specific limitations of such reinstatement rule.

This question is divided into two parts. The first part relates to persons who have formerly served in the apportioned service. The second part relates to persons who have never served in the apportioned service.

The Civil Service Commission was established by the Act of January 16, 1883, ch. 27, 22 Stat. 403, 404. Section 2 of that act provides in part:

"That it shall be the duty of said commissioners: FIRST, To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, * * *.

"SECOND. And among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

* * * * * * *

"Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been resident of such place.

* * * * * * *

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"Eighth, * * *

* * * And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the Commission."

It is to be noted that the above-quoted provisions of law require the members of the Commission to aid the President in preparing suitable rules for carrying the act into effect, and require, among other things, that said rules shall provide and declare "as nearly as the conditions of good administration will warrant", that appointments in the Departments at Washington shall be apportioned among the several states and territories and the District of Columbia upon the basis of population. It is to be further noted that the President is authorized to make exceptions to such rules. Although there is no express authority for Rule IX, it has always been regarded as being authorized under the President's power to make exceptions. Under this authority the President is authorized to except reinstatements from the application of the law of apportionment or to require the Commission to apply the law in certifying persons for reinstatement to the apportioned service. The precise question is whether the President has by Rule IX authorized the Commission to apply the law of apportionment.

Civil Service Rule IX provides:

"A person separated without delinquency or misconduct from a competitive position or from a position which he entered by transfer or promotion from a competitive position or to accept another appointment in the executive civil service may be reinstated upon certificate of the Commission subject to the following limitations:

"(a) Unless otherwise provided hereinafter, a person may be reinstated only to the department or independent Government establishment from which separated and upon requisition made within 1 year from the date of his separation. In its discretion the Commission may after absolute appointment allow reinstatement in any part of the classified service, and it may also authorize waiver of the 1-year limit herein prescribed, under the following time limitations: 2 years where service has been 2 years but less than 3

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years; 3 years where service has been 3 years but less than 4 years; 4 years where service has been 4 years but less than 5 years; and without time limit where service has been 5 years or more: *Provided*, That the applicant for reinstatement who has been separated more than 5 years is otherwise eligible as set forth under the conditions of the Executive order of June 2, 1920: *And provided further*, That he can qualify under an appropriate noncompetitive examination.

"(b) A former classified employee entitled to military preference in appointment may be reinstated without time limit.

"(c) A former classified employee retired upon annuity under the act of May 22, 1920, by reason of total disability, who is eligible for reinstatement in his former department or office by reason of recovery and termination of annuity, shall also be eligible for reinstatement to an appropriate position in any part of the service, subject to the conditions and limitations of the civil-service rules.

"(d) No person in any of the foregoing groups may be reinstated to a position requiring an examination different from that required in the position from which he was separated without passing an appropriate examination.

"(e) An employee involuntarily separated during or at the end of probation, without fault on his part, may be reinstated to serve a new probation in any part of the service, in any position for which he has qualified, or can qualify in an appropriate noncompetitive examination, subject to the other provisions of the civil-service rules."

It appears that with the exception of a short interval prior to 1903, during which the rule relating to reinstatement was in different phraseology, to 1931, almost the entire life of the Commission, the Commission has not regarded the rule relating to reinstatement as authorizing the Commission to apply the law of apportionment in the reinstatement of persons to the apportioned service. Without any change in the rule, the Commission, on March 20, 1931, by a majority vote (Commissioner Wales, the only lawyer member of the Commission, dissenting) approved the following Minute:

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"APPORTIONMENT — REINSTATEMENT—TRANSFER.—*Persons* who have met the requirements of apportionment and have served in the apportioned service may be reinstated or transferred to the apportioned service without again meeting such requirements. Others must be eligible for appointment to the apportioned service as of the date on which reinstatement or transfer to the apportioned service is authorized. Waiver of apportionment will only be made by the Commission itself, and only upon a statement of reasons showing that such transfer or reinstatement is required for the interest of the service."

This Minute was followed by a Minute of August 5, 1932, to which Commissioner Wales likewise dissented. The Minute is as follows:

"REINSTATEMENTS AND RETRANSFERS TO APPORTIONED SERVICE.—The Commission has approved the memorandum recommending that reinstatements and retransfers to the apportioned service of persons from States in excess be not permitted."

In view of the long-continued administrative construction of Rule IX as not authorizing the Commission to apply the law of apportionment in the reinstatement of persons to the apportioned service, and since the action of the Commission of March 20, 1931, and August 5, 1932, was taken without any change in the rule by the President, the Commission now questions the legality of these Minutes.

Rules VII, IX and X, relating to certification, reinstatement, and transfer, respectively, are those to which the law of apportionment might properly be applied. Rules VII and X contain specific references to the apportionment law. Rule IX, however, contains no reference to this law, and I am unable to find therein any language which impliedly authorizes the Commission to apply the law in the reinstatement of persons to the apportioned service. The specific reference to the law in Rules VII and X and the silence of Rule IX in this respect is significant; in fact it would seem to indicate when the President authorizes the Commission to apply the law of apportionment in the administration of any rule, he does not leave the matter to inference or implication. As heretofore pointed out, the rule was construed

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by the Commission from its establishment in 1883 until the adoption of the Minute in 1931, with the exception of a short period prior to 1903, as not authorizing the Commission to apply the law of apportionment in reinstatements. It is well settled that the courts will not disturb long-continued administrative construction of a statute unless it is clearly erroneous.

Under the circumstances, it is my opinion that the President has not authorized the Commission by Rule IX to apply the law of apportionment in the reinstatement of persons to the apportioned service. It follows, therefore, that the above-mentioned Minutes are not authorized under Rule IX of the Civil Service Rules.

The second part of the Commission's question refers to the case of a person who passed an examination for a certain type of position which entitled him to have his name placed and continued for a certain length of time on two registers, one for appointment to the apportioned and the other to the non-apportioned service. Upon accepting appointment to a non-apportioned position, his name was removed from both registers and his eligibility for appointment to the apportioned service was cancelled. The Commission states that it was within its power to continue his name on the apportioned register for a certain length of time if it had so desired, but that such action was taken to prevent undue interference in the conduct of public business through the training of a second employee in the event the first employee should be certified for appointment to a position in the apportioned service.

During the period in which his name could have been continued on the apportioned register his vacated position on that register was reached so that if his name had been permitted to remain thereon he would have been certified by the Commission for appointment to a position in the apportioned service. After serving several years in the non-apportioned position he resigned. He now seeks to be reinstated to a position in the apportioned service. Under the practice existing prior to the adoption of the above-mentioned Minutes, the Commission would have certified him for reinstatement on the theory that there was an obligation resting upon the Commission to protect the right to be

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appointed to a position in the apportioned service which the employee acquired through his competitive civil service examination.

In the circumstances, the Commission inquires as to whether or not such reinstatement could be made under the opinion of the Attorney General reported in 37 Op. at page 7, on the theory that the person seeking reinstatement acquired a status therefor at the time his vacated position on the apportioned register was reached as above-mentioned.

In the opinion referred to, Attorney General Mitchell had occasion to consider the authority of the Commission to issue a certificate *nunc pro tunc.* The employee involved had passed a competitive examination. Subsequently, without certification by the Commission, she received an appointment to an excepted position in one of the departments. During her tenure of service her name was reached on the register of the Civil Service Commission for certification to a position in the classified civil service. Had the officer who appointed her to the excepted position known of this fact, he could have requested the Commission to certify her name for appointment to the excepted position and she would have thereby acquired an eligibility status for appointment, transfer, or reinstatement to a position in the classified civil service. Attorney General Mitchell quoted the following excerpt from the opinion of Attorney General Sargent (35 Op. 413, 418):

"'* * * it has been the practice of the Commission for perhaps forty years to issue such certificates or to take other curative action *nunc pro tunc* in meritorious cases when its attention has been drawn to the omission of some formality necessary to preserve the rights of an employee, and I have no reason to doubt its power to do so. Aside from the probable correctness of its conclusion, the uniform practice followed for so many years may not, under the principle referred to above, be lightly disturbed.'"

He then concluded as follows:

"In this respect I am in full accord with the opinion of my predecessor, for obviously Congress intended that in creating the Civil Service Commission it was thereby protecting the rights of civil service employees as well as the interests of the United States and the failure of an appoint-

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ing officer to take the proper formal action should not be permitted to annul or obliterate the status to which an employee, perhaps without his knowledge, was entitled at any given time. Obviously, the curative action indicated is the issuance by the Commission of a certificate *nunc pro tunc* as soon as a matter of this sort is brought to its attention." [37 Op. 14.]

Since the employee in the case submitted by the Commission acquired by competitive examination a right to be appointed to a position in the apportioned service, and since the Commission could have preserved this right by continuing him on the apportioned register but did not do so, it is my opinion that the case falls within the above-referred-to opinions, and the Commission may now take such curative action as may be necessary to accord to the employee a status of eligibility for reinstatement to a position in the apportioned service as of the date his vacated position was reached on the apportioned register. Since the answer to the first part of the Commission's question is that the Commission is not authorized to apply the law of apportionment in certifying persons for reinstatement to positions in the apportioned service, the answer to the second part of its question necessarily is that the Commission may reinstate the employee in question without regard to the law of apportionment.

Respectfully,

J. CRAWFORD BIGGS,
Acting Attorney General.

To the PRESIDENT.

EXEMPTION OF AMERICAN MINISTER TO ALBANIA FROM COMPULSORY RETIREMENT

Section 204 of the Economy Act of June 30, 1932, 47 Stat. 404, supersedes section 26 (d) of the Act of February 23, 1931, 46 Stat. 1211, insofar as the latter section authorizes the President to continue persons in the service of the United States.

A foreign service officer becomes eligible for retirement on August 6, 1934, under section 26 (n) of the Act of February 22, 1931, *supra*. *Held*, that such officer does not reach the age prescribed for automatic separation from the service until September 1, 1934. (*See* Executive Order No. 6834 of August 29, 1934.)

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DEPARTMENT OF JUSTICE,
August 28, 1934.

SIR: I have the letter of the Acting Secretary of State of August 27, 1934, enclosing memorandum of the Legal Adviser to the Secretary relative to the authority of the President to issue an Executive order exempting Mr. Post Wheeler, American Minister to Albania, from retirement for age and continuing him in the service for such time as may be deemed necessary, not in excess of two months from August 6, 1934. [Executive Order, No. 6834, Aug. 29, 1934.]

I am enclosing a revised draft of the proposed Executive order submitted by the Acting Director of the Bureau of the Budget for the consideration of the Attorney General under the provisions of Executive Order No. 6247 of August 10, 1933.

The original draft relies upon Subsection (d) of Section 26 of the Act of February 23, 1931 (ch. 276, 46 Stat. 1211), as authority for the issuance of the order. Subsection (d) as now embodied in Section 21 (d) of Title 22, United States Code, is as follows:

"When any Foreign Service officer has reached the age of sixty-five years and rendered at least fifteen years of service he shall be retired: *Provided*, That if any such officer shall have served thirty years he may be retired at his own request before reaching the age of sixty-five years: *Provided further*, That the President may in his discretion retain any such officer on active duty for such period prior to his reaching seventy years of age, as he may deem for the interests of the United States."

Section 204 of the Economy Act of June 30, 1932 (ch. 314, 47 Stat. 382, 404), provides:

"On and after July 1, 1932, no person rendering civilian service in any branch or service of the United States Government or the municipal government of the District of Columbia who shall have reached the retirement age prescribed for automatic separation from the service, applicable to such person, shall be continued in such service, notwithstanding any provision of law or regulation to the contrary: *Provided*, That the President may, by Executive Order, exempt from the provisions of this section any person when, in his judgment, the public interest so requires: * * *."

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It is my opinion that Section 204 supersedes Section 26 (d) of the Act of February 23, 1931, *supra*, in so far as that section authorizes the President to continue persons in the service of the United States. This view is confirmed by the testimony of Mr. Roop, then Director of the Bureau of the Budget and author of the first proviso of Section 204. given at the hearings held by the Senate on the bill which became the Economy Act (Senate Hearings, page 75).

It appears that Mr. Wheeler became eligible for retirement on August 6, 1934, under the provisions of Section 26 (n), Act of February 23, 1931, *supra* (U. S. C., Title 22, Sec. 21 (n)). Section 1 of the Act of April 23, 1930, ch. 209, 46 Stat. 253, is as follows:

"That hereafter retirement authorized by law of Federal personnel of whatever class, civil, military, naval, judicial, legislative, or otherwise, and for whatever cause retired, shall take effect on the 1st day of the month following the month in which said retirement would otherwise be effective, and said 1st day of the month for retirements hereafter made shall be for all purposes in lieu of such date for retirement as may now be authorized; except that the rate of active or retired pay or allowance shall be computed as of the date retirement would have occurred if this Act had not been enacted."

Under the provisions of the above-quoted statute, Mr. Wheeler does not reach the age prescribed for automatic separation from the service until September 1, 1934.

The President is, therefore, authorized to issue the proposed order.

In view of the conclusion reached, the revised draft recites Section 204 of the Economy Act of June 30, 1932, *supra*, instead of Section 26 (n) of the act of February 23, 1931, *supra*, as authority for the proposed order. The other changes made in the original draft relate merely to form.

The revised draft of the proposed order has my approval as to form and legality.

Respectfully,

J. CRAWFORD BIGGS,
Acting Attorney General.

To the SECRETARY OF STATE.

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SELECTION OF PERSONNEL IN BUREAU OF THE CENSUS IN CONNECTION WITH PENDING AGRICULTURAL CENSUS

The President has the power under section 1753 of the Revised Statutes and section 2 of the Civil Service Act of January 16, 1883, to authorize the establishment of a special reemployment list for temporary employment in the Bureau of the Census in connection with the pending agricultural census. (*See* Executive Order No. 6838 of September 1, 1934.)

DEPARTMENT OF JUSTICE,
August 28, 1934.

SIR: Pursuant to Executive Order No. 6247 of August 10, 1933, there is transmitted herewith a revised draft of a proposed Executive order submitted by the Acting Director of the Budget under date of August 27, 1934, authorizing the establishment of a special reemployment list for temporary employment in the Bureau of the Census in connection with the pending Agricultural Census required by Section 16 of the Act of June 18, 1929, c. 28, 46 Stat. 21, 25 (U. S. C., Supp. VII, Title 13, Sec. 216).

The effect of the proposed order is to authorize the Civil Service Commission to give to those whose names are on the special reemployment list priority in certification for appointment to temporary positions in the Bureau of the Census. The President is empowered to issue the proposed order under Section 1753 of the Revised Statutes, and Section 2 of the Civil Service Act of January 16, 1883. Section 1753 authorizes the President to prescribe such regulations for the admission of persons into the Civil Service of the United States as may best promote the efficiency thereof.

The Civil Service Act authorizes the President to prescribe rules for the admission of persons into the Civil Service of the United States which "as nearly as the conditions of good administration will warrant", shall provide for competitive examinations, apportionment of appointments among the several states and territories and the District of Columbia upon the basis of population, etc. By section 2 of the act, the President is authorized to make exceptions to such rules. The proposed order will be an exception to the Civil Service Rules.

Precedents for the issuance of the order are the Executive Orders of November 29, 1918 and April 30, 1919 [Nos. 3011 and 3083], issued by President Wilson; of January 28, 1927

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and February 18, 1927 [Nos. 4589 and 4577], issued by President Coolidge, and the Executive Order of September 20, 1932 [No. 5924], issued by President Hoover, establishing reemployment registers.

The changes made in the original draft do not alter the sense of the proposed order, the revised draft of which has my approval as to form and legality.

Respectfully,

J. CRAWFORD BIGGS.
Acting Attorney General.

To the SECRETARY OF STATE.

WITHHOLDING THE ISSUANCE OF PATENTS TO THE NORTHERN PACIFIC RAILWAY COMPANY FOR CERTAIN LANDS

The Act of June 25, 1929, chapter 41, 46 Stat. 41, requires the Secretary of the Interior to withhold the issuance of patents to the Northern Pacific Railway Co. for lands selected by it in lieu of lands within Mount Rainier National Park pending termination of the litigation authorized and directed by this act.

DEPARTMENT OF JUSTICE,
August 29, 1934:

SIR: I have the honor to refer to your letter of August 22, requesting my opinion whether the Act of June 25, 1929, c. 41, 46 Stat. 41, requires the Secretary of the Interior to withhold the issuance of patents to the Northern Pacific Railway Company for "lieu lands" selected under the provisions of the Act of March 2, 1899, c. 377, 30 Stat. 993.

Under the Act of July 2, 1864, c. 217, 13 Stat. 365, and the Joint Resolution of May 31, 1870, 16 Stat. 378, the Northern Pacific Railroad Company, predecessor of the Northern Pacific Railway Company, was granted certain lands. The Act of March 2, 1899, authorized the railroad to surrender to the United States so much of its land grant as lay within the newly created Mt. Rainier National Park and to select in lieu thereof lands located elsewhere. The lands within the Park were surrendered, but the selection of other lands has not been completed.

Subsequently, the railroad claimed that its grants had been deficient in acreage and that it was entitled to select "indemnity lands" within national forests, and, on the other hand, the United States contended that the railroad

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had forfeited its right to some lands for breach of conditions subsequent. Congress, after investigation, passed the Act of June 25, 1929, which reads, in part, as follows:

" SEC. 5. The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be entitled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other

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proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment.

"SEC. 9. That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto; and *he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith,* until the suit or suits contemplated by this Act shall have been finally determined: *Provided,* That this Act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to the Northern Pacific Railroad Company, or its successors, or any Acts in modification thereof or supplemental thereto." [46 Stat. 44] [Italics supplied.]

The suit thus directed was duly instituted and has not yet been concluded.

The question depends upon whether the words of the Act of June 25, 1929, directing the withholding of further patents under the Act of June 2, 1864, the Joint Resolution of May 31, 1870, and "*legislative enactments supplemental thereto, or connected therewith,*" include the Act of March 2, 1899, as "supplemental to" or "connected with" the earlier Act and Resolution. That the words *literally* include the 1899 Act is hardly open to question; and, under such circumstances, the result being neither unduly harsh nor absurd, there is ordinarily no occasion for going beyond the language of the statute.

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Considering the possibility, at least, that the surrendered lands, no less than others, may have been "wrongfully patented or certified," with probable effect on the selection of "lieu lands," the suggested literal interpretation, requiring temporary suspension of the patenting of "lieu lands" as well as others, would appear to be reasonable and proper. There is a statement in the papers submitted with your letter that the surrendered lands were not actually affected by the controversy but, assuming this to be true, it is not sufficient to withdraw from the operation of the statute a case clearly comprehended within its language, and nothing in the legislative antecedents of the measure which has been brought to my attention would support such a construction. The legislation was apparently broad enough to encompass all possible questions and all lands, and the scope of the provision for maintaining the *status quo* during the litigation must be measured accordingly, rather than upon consideration of the issues as finally drawn in the suit.

Considering the foregoing, it is my opinion that the Secretary of the Interior should withhold the issuance of patents to the Northern Pacific Railway Company for lands selected by it in lieu of lands within Mt. Rainier National Park pending the termination of the litigation directed by the Act of June 25, 1929.

Respectfully,

J. CRAWFORD BIGGS,
Acting Attorney General.

To the SECRETARY OF THE INTERIOR.

AVAILABILITY OF APPROPRIATION FOR THE VIRGIN ISLANDS FOR CERTAIN TRANSPORTATION OF PERSONS APPOINTED TO POSITIONS IN SUCH ISLANDS FROM THE UNITED STATES

The appropriation for the Virgin Islands for the fiscal year 1935 (Pub. No. 109, 73d Cong. [48 Stat. 362, 392]) is not available for payment of the return transportation of persons appointed from the continental United States to positions in the Virgin Islands who may be discharged without prejudice or resign after service of not less than 1 year, or for transportation for employees from the Virgin Islands to the United States and return for the purpose of taking leave.

The rule of *ejusdem generis* and *expressio unius est exclusio alterius* held applicable.

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DEPARTMENT OF JUSTICE,
September 5, 1934.

SIR: I have your letter of August 30, 1934, enclosing in response to my request of August 8, 1934, an opinion of the Solicitor of the Interior Department as to the authority of the President to issue the proposed Executive order submitted by the Acting Director of the Bureau of the Budget for the consideration of the Attorney General under date of July 19, 1934.

The proposed order modifies Executive Order No. 5566 of February 27, 1931, entitled "Placing the Government of the Virgin Islands under the supervision of the Department of the Interior." Under that order the Secretary of the Interior was authorized, among other things, to contract to furnish persons appointed from the continental United States to positions in the Virgin Islands free transportation from the port of departure in the United States to the Islands. The proposed order would extend this authority so as to allow the granting of free return transportation to any of such employees who may be discharged without prejudice or who may resign after a period of service of not less than one year, and also free transportation for such employees from the Virgin Islands to the port of departure in the United States and return for the sole purpose of taking leave, but not more than once during each two-year period of service.

Executive Order No. 5566 of February 27, 1931, purports to be authorized by the act of March 3, 1917, entitled "An Act to provide a temporary government for the West Indian Islands acquired by the United States from Denmark * * * and for other purposes". (C. 171, 39 Stat. 1132), and the proposed order is said to be authorized under Section 1 of the same Act.

Since the proposed order would be ineffective if no appropriation is available to carry out its purposes, the question as to the availability of such an appropriation will be considered first.

The appropriation for the Virgin Islands for the fiscal year ending June 30, 1935 (Public No. 109, 73d Congress, 2d sess.), so far as material here, is as follows:

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"For salaries of the Governor and employees incident to the execution of the Act of March 3, 1917 (U. S. C., Title 48, Sec. 1391), *traveling expenses of officers and employees while absent from place of duty on official business*, necessary janitor service, care of Federal grounds, repair and preservation of Federal buildings and furniture, purchase of equipment, stationery, lights, water, and *other necessary miscellaneous expenses*, including not to exceed $4,000 for purchase, including exchange, maintenance, repair and operation of motor-propelled passenger-carrying vehicles, and not to exceed $4,000 for personal services, household equipment and furnishings, fuel, ice, and electricity necessary in the operation of Government House at Saint Thomas and Government House at Saint Croix; $117,840." [Italics supplied.] (48 Stat. 392.)

It has been suggested that the language "other necessary miscellaneous expenses" makes the above-mentioned appropriation available for the payment of the transportation authorized by the proposed order. I am unable to agree with this view.

It is to be noted that the words "other necessary miscellaneous expenses" immediately follow several specifically described classes of expenses. The rule of *ejusdem generis* is applicable here. As stated in 1 Fed. Stat. Ann. (2d Ed.), page 116, section 91, it is as follows:

"While unqualified general terms are usually to be given their natural and full signification, yet when general words follow in a statute words of particular and special meaning, if there be not a clear manifestation of different legislative intent, they are construed as applicable to persons and things, or cases of like kind, as are designated by the particular words. This rule, which is sometimes called Lord Tenterden's rule, has been stated as to the word 'other' thus: Where a statute enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like', so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated. * * *."

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An examination of the act as a whole fails to disclose that the Congress intended that the above-mentioned rule of interpretation should not be applied in determining the meaning of the act. Under the circumstances, it is my opinion that the words "other necessary miscellaneous expenses" do not include unofficial traveling expenses such as those authorized by the proposed order.

Furthermore, it is a general principle of interpretation that the express mention of one thing implies the exclusion of other things. According to this rule, it has been held that the enumeration of various objects to which money specified in an appropriation Act is to be applied, indicates an intention on the part of the Congress to exclude all other objects (18 Op. 146, 147). Since there is nothing in the language of the act to indicate that the Congress did not intend this rule of interpretation to be applied in ascertaining the objects for which the appropriation is made available, it must be held that the specific authorization to use the appropriation for the payment of official traveling expenses impliedly prohibits its use for the payment of any other kind of traveling expenses.

Since there is no appropriation available to carry out the purposes of the proposed order, it would appear to be unnecessary to consider the authority of the President to issue it under the act of March 3, 1917, *supra*, and its legal effect, if issued, upon the rights of employees granted such free transportation.

The proposed order and other papers enclosed with your letter of submission are herewith returned.

Respectfully,

HOMER CUMMINGS.

To the DIRECTOR OF THE BUDGET.

SCOPE OF PROVISO CONTAINED IN BUREAU OF INTERNAL REVENUE APPROPRIATION MADE BY EMERGENCY APPROPRIATION ACT, FISCAL YEAR 1935

The proviso contained in the appropriation for collecting the internal revenue made by the Emergency Appropriation Act, fiscal year 1935, and herein set out, applies to all persons who were separated from the service of the Bureau of Prohibition and the Alcoholic Beverage Unit of the Department of Justice between June 10, 1933, and

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December 31, 1933, either by Executive Order No. 6166 of June 10, 1933, or by direct action of the Department of Justice, including those who were reappointed without break in service or within 4 months under authority of the said Executive order, or who were subsequently reinstated under Civil Service Rule IX.

The said proviso is not limited in its application to positions in the Bureau of Internal Revenue but applies to all positions in the Treasury Department similar in *type* or *kind* to those formerly existing in the Bureau of Prohibition and the Alcoholic Beverage Unit.

DEPARTMENT OF JUSTICE,
September 6, 1934.

SIR: I have received a communication from your Assistant Secretary, Mr. M. H. McIntyre, enclosing a letter addressed to you by the Civil Service Commission dated July 18, 1934, in which the Commission requests the opinion of the Attorney General on several questions arising in connection with the following provision of the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (Public, No. 412, 73d Cong. [48 Stat. 1061]):

"BUREAU OF INTERNAL REVENUE

"Collecting the internal revenue: For an additional amount for expenses of assessing and collecting the internal-revenue taxes, including the same objects specified under this head, and under the head 'Salaries and expenses, Bureau of Industrial Alcohol', in the Treasury Department Appropriation Act, 1935, and including so much as may be necessary for the compensation of one additional deputy commissioner, to be immediately available, $10,000,000; of which not to exceed $800,000 may be expended for personal services in the District of Columbia, and not to exceed $71,250 for the purchase of passenger-carrying automobiles to be used on official business: *Provided*, That after December 1, 1934, no part of the appropriation made herein or heretofore made for the fiscal year 1935 shall be used to pay the salary of any person formerly employed as investigator, special agent, senior warehouseman, deputy prohibition administrator, agent, assistant attorney, assistant prohibition administrator, senior investigator, deputy production administrator, storekeeper or gauger, or any other position in the Prohibition Bureau or Alcoholic Beverage Unit, Department

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of Justice, who was separated from the service of such Bureau or Unit between June 10, 1933, and December 31, 1933, while in any such position in the Treasury Department, unless and until such person shall be appointed thereto as a result of an open, competitive examination to be hereafter held by the Civil Service Commission" (48 Stat. 1061).

In its request for opinion, the Commission states:

"It is a matter of considerable importance to the Commission before it undertakes the examining program called for by this provision of law to be able to determine definitely to what persons now employed in the Treasury Department and to what Treasury Department positions such examining program shall apply."

The Commission's questions relate to the proviso of the above-quoted provisions of the statute. The first and second question may be considered together. They are as follows:

"1. Does the above-quoted provision of the Deficiency Appropriation Act of June 19, 1934, apply to persons now in the Treasury Department in positions defined in the answers to Questions 3 and 4 below, who were automatically 'separated from the service of the United States' on August 9, 1933, through the operation of the last paragraph of Section 19 of Executive Order No. 6166 of June 10, 1933, and who. under the authority granted to the head of the successor agency in the same paragraph, were immediately reappointed by him in the successor agency without break in service?"

"2. Does the above-quoted provision. apply in the case of those who were similarly separated on August 9, 1933, who were not immediately reappointed in the successor agency, but who were reappointed in such agency within the four months period stated in the Executive Order of June 10, 1933, after a break in service?"

Relative to the first and second questions, it is clear that the language of the proviso includes all persons who were separated from the service of the Bureau of Prohibition and the Alcoholic Beverage Unit of the Department of Justice between June 10, 1933, and December 31, 1933. Section 3 of Executive Order No. 6166 of June 10, 1933, abolished the Bureau of Prohibition and transferred certain functions

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thereof to the Treasury Department, and the remaining functions to other units in the Department of Justice. The employees of the Bureau of Prohibition were automatically "separated from the service of the United States" by the last paragraph of section 19 of Executive Order No. 6166. It is immaterial that some of these employees were immediately reappointed in the Treasury Department without a break in service while others were reappointed within four months under the authority of section 19 and still others were subsequently reinstated under Civil Service Rule IX, for obviously all of such employees were separated from the service by the Executive Order. The Alcoholic Beverage Unit was created in the Department of Justice subsequent to the abolition of the Bureau of Prohibition to perform certain of the functions formerly performed by the Bureau. The separation from the service of employees of the Alcoholic Beverage Unit prior to December 31, 1933, was accomplished by direct action of the Department, and such separation, therefore, brings such employees clearly within the scope of the proviso.

Accordingly, the first and second questions are answered in the affirmative.

The Commission's third and fourth questions are as follows:

"3. What types of positions are covered by the expression 'any such position in the Treasury Department', as used in the above-quoted provision? Does such expression include, in addition to the positions specifically named,—

"(a) Only those positions the duties of which are of the same nature as those specifically named, for example, positions involving investigational, legal, regulatory, and administrative duties; or

"(b) In addition to these, all types of positions of whatever nature, including, for example, clerks, stenographers, and typists?"

"4. Does the expression 'any such position in the Treasury Department', as used in the above-quoted provision, include—

"(a) Only those positions, of the types indicated in the answer to Question 3, the duties of which are a part of the work of enforcing the liquor laws which was transferred

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from the Department of Justice to the Treasury Department; or

"(b) In addition to these, positions of the types indicated in the answer to Question 3, the duties of which are a part of the other functions of the Treasury Department, such as enforcement of the customs, narcotics, or income-tax laws?"

The Emergency Appropriation Act, fiscal year 1935, makes separate appropriations for the Executive, Emergency Relief, Petroleum Administration, Department of Agriculture, Department of the Interior, and Treasury Department, and amends the Agricultural Adjustment Act. That part of the Act making appropriations for the Treasury Department is further subdivided into parts entitled "Office of the Secretary", "Bureau of Internal Revenue", "Secret Service Division", and "Procurement Division, Public Works Branch." The proviso under consideration is a part of the subdivision entitled "Bureau of Internal Revenue." It states that "no part of the appropriation made herein or heretofore made for the fiscal year 1935 shall be used to pay the salary of any person * * *". Standing alone, the "appropriation made herein" would appear to refer to the appropriation of $10,000,000 made in the preceding part of the subdivision for "Collecting the internal revenue", and the words "heretofore made" would appear to refer to the prior appropriation made for the same purpose for the fiscal year 1935. Under this interpretation the proviso would be limited in its application to the appropriation made for the Bureau of Internal Revenue. The proviso, however, also contains the words "while in any such position in the Treasury Department". If it had been intended to limit the scope of the subdivision to the Bureau of Internal Revenue, the Congress would logically have used the words "Bureau of Internal Revenue", instead of the words "Treasury Department", especially since the subdivision is entitled "Bureau of Internal Revenue". It is impossible, of course, to give effect to the literal meaning of the language "while in any such position in the Treasury Department" unless the words "no part of the appropriation made herein" and "heretofore made" refer not only to the appropriation made for the Bureau of Internal Revenue

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but include also all other appropriations made for the Treasury Department. The above-mentioned words are broad enough to permit such interpretation. The use of the language "no part of the appropriation made herein or heretofore made for the fiscal year 1935" and "in the Treasury Department" creates an ambiguity, and hence resort may be had to the legislative history of the act to ascertain the intention of its framers. Upon reference thereto, it is found that in the Conference Report, House Report No. 2057, 73d Congress, 2d Session, the Managers on the part of the House reported to that body relative to the legislation under consideration as follows (p. 13):

"No. 292: Inserts the amendment proposed by the Senate providing that after October 1, 1934, no part of the appropriation made in this act or heretofore made for the fiscal year 1935 shall be used to pay the salary of any person formerly employed as investigator, special agent, senior warehouseman, deputy prohibition administrator, agent, assistant attorney, assistant prohibition administrator, senior investigator, deputy production administrator, storekeeper or gager, or any other position in the Prohibition Bureau or Alcoholic Beverage Unit, Department of Justice, who was separated from the service of such Bureau or Unit between June 10, 1933, and December 31, 1933, while in any such position in the Treasury Department, unless and until such person shall be appointed thereto as a result of an open, competitive examination to be hereafter held by the Civil Service Commission, modified so as to change the date of October 1, 1934, to December 1, 1934."

It will be observed that the Conference Report interprets the words of the subdivision "no part of the appropriation made herein or heretofore made for the fiscal year 1935" as meaning "no part of the appropriation made in this act or heretofore made for the fiscal year 1935". Since Senate amendment No. 292 was a part of the proposed Emergency Appropriation Act, it is clear that the words "this act" refer to that part of that act making appropriations for the Treasury Department, and the words "heretofore made" refer to prior appropriations made for the Treasury Department.

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Furthermore, a consideration of the proviso as a whole leads inevitably to the conclusion that it is directed primarily to persons rather than positions.

Considering all of the circumstances, it is my opinion that the proviso in question is not limited in its application to positions in the Bureau of Internal Revenue but applies also to positions in the other bureaus and units of the Treasury Department.

It is to be noted, however, that the word "position" in the language "while in any such position in the Treasury Department" is modified by the word "such", which clearly refers to those positions in the Bureau of Prohibition and the Alcoholic Beverage Unit mentioned in the preceding language. The use of the word "such", in my judgment, indicates an intention on the part of the Congress to limit the effect of the proviso to those positions in the Treasury Department which are similar or correspond to positions in the former Bureau of Prohibition and the Alcoholic Beverage Unit and which are now occupied by former employees of the said Bureau and Unit who were separated therefrom between June 10, 1933, and December 31, 1933.

The positions covered by the proviso are not necessarily limited to those positions the incumbents of which are engaged in the performance of the functions transferred from the Department of Justice, but include all positions in the Treasury Department similar in *type* or *kind* to those formerly existing in the Bureau of Prohibition and the Alcoholic Beverage Unit. Hence, the proviso applies to any employee in the Treasury Department who was separated from service in the Bureau of Prohibition or the Alcoholic Beverage Unit between June 10, 1933, and December 31, 1933, and whose duties are similar in kind, but not necessarily similar as to subject matter, to those formerly performed by any employee in the said Bureau or Unit. For example, if there were legal positions in the Bureau of Prohibition or the Alcoholic Beverage Unit and a former employee of the said Bureau or Unit was reappointed to or reinstated in a legal position in any Bureau or Unit of the Treasury Department, such person would come within the scope of the proviso, regardless of the kind of position

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held and the character of the work performed by him in his former position.

The Commission's third and fourth questions are answered accordingly.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

AUTHORITY OF SUBSISTENCE HOMESTEADS CORPORATION UNDER SECTION 208 OF THE NATIONAL INDUSTRIAL RECOVERY ACT

The Federal Subsistence Homesteads Corporation is not authorized under section 208 of the National Industrial Recovery Act to convey land and buildings to cooperatives of homesteaders for leasing to individual homesteaders.

The Corporation may convey land to a cooperative for community use of homesteaders who have previously purchased homestead tracts, and it may construct, equip, and convey to a cooperative, but not gratuitously, certain things enumerated herein administratively determined to be reasonably necessary for carrying out the purposes of the Recovery Act.

The Corporation may make loans to a cooperative to enable it to operate. It may not make loans to a private industry, but it may sell or lease land to a private industry to induce it to locate near a subsistence homestead. It may also lease tracts to teachers, social workers, and professional technicians and convey to local counties, or dedicate to the public, streets, parks, etc., constructed with funds made available under section 208.

Moneys paid to the Corporation by homesteaders as interest on amortization or on advances made by the Corporation should be covered into the Treasury as miscellaneous receipts.

Lands purchased for subsistence homesteads which cannot be used immediately may be leased by the Corporation, and the rentals received should be covered into the Treasury as miscellaneous receipts.

DEPARTMENT OF JUSTICE,
September 10, 1934.

SIR: I have the honor to comply with your request of August 17 for my opinion upon the questions hereinafter indicated, arising under Section 208 of the National Industrial Recovery Act, c. 90, 48 Stat. 195, 205, which appropriated $25,000,000 to be used by the President "through such agencies as he may establish and under such regulations as he

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may make, for making loans for and otherwise aiding in the purchase of subsistence homesteads."

"1. May Federal Subsistence Homesteads Corporation (hereinafter referred to as 'the Corporation') convey land and buildings to the co-operative of the homesteaders, rather than directly to the homesteaders, the co-operatives in turn to execute leases of individual tracts to homesteading families? (This procedure is being considered for some projects because it will enable all the properties to be co-operatively owned, and will avoid speculation by individual homesteaders on a rise in land values.)"

In explanation, you state that it has been planned to organize the homesteaders in some communities into cooperative associations, formed under applicable state laws, also admitting to membership a small number of other persons, described as "technical personnel."

In my opinion to you of October 4, 1933 (37 Op. 290), concerning alternative plans for temporarily retaining title in the United States or in a non-profit corporation, I stated: "It should be borne in mind that the statute necessarily contemplates that the persons who occupy the land and the houses erected thereon will actually purchase them. No particular form of contract is prescribed, but it is rather difficult to conceive of one which would come within the spirit of the statute and yet not bind the settlers as purchasers, or intended purchasers, of the premises occupied."

In my opinion, a contract of lease does not amount to a purchase, within the meaning of the provision authorizing "loans for * * * the purchase of subsistence homesteads", and ownership by the lessor (the association) would not be ownership by the lessee (the tenant); nor do I think that a collective or communal ownership was intended by Congress. For these reasons I conclude that the suggested plan is not authorized.

"2. May the Corporation, after entering into contracts with individual homesteading families for the outright sale to such families of small homestead tracts and dwellings, convey to the co-operative of homesteaders a tract of land to be held by such co-operative for use as pasture, woodland, cemetery plot, athletic field, play-ground, parks, general farm, or general orchard, for the equal benefit of

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all of the homesteading families? (It is frequently uneconomical to break up all the land into individual homestead tracts; the topography and nature of the soil, and the location of the individual tracts frequently make it desirable, or even imperative, that a large piece of land be set aside for pasture, woodland, play-ground, general farm, etc., for the equal benefit of all the homesteaders; so, too, some crops intended for the use of the homesteaders can be grown more economically on one large general farm or general orchard, in the products of which all the homesteaders may share.)"

"3. May the Corporation expend money made available in Section 208 to construct and equip any or all of the below listed properties, and then convey such properties to the co-operative of the homesteaders which will operate the properties so as to give employment to some homesteaders, and make available to all homesteaders products, services and materials at cost:

a. A dairy or poultry farm? (A herd of 100 cows may be adequate to supply milk, cream, cheese and butter for 200 families; one large poultry and dairy farm can more economically and efficiently provide for the needs of 200 families than 200 separate small farms. In such cases it is contemplated to have the livestock and equipment owned by the co-operative, with all homesteaders sharing equally in the products.)

b. A general merchandise store? (It is desired to secure the economies of large scale purchases of food and other staples, seed, fertilizer, clothing, and other general small articles, which may then be sold to homesteaders at cost.)

c. A first-aid clinic or small hospital? (This can be inexpensively equipped. Where it is many miles to the nearest hospital, this may be essential. A nurse or doctor may be included among the homesteaders.)

d. A small handicraft shop or factory? (To provide employment for cash income for some of the homesteaders, to manufacture small articles needed by the homesteaders, and to enable all the homesteaders to share in any profits from the sale of such articles.)"

"4. May the Corporation make a loan to such a co-operative of the homesteaders for operating capital?"

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"6. May the Corporation purchase and then sell to the co-operative of homesteaders farm implements and farm machinery? (Heavy farm machinery is sometimes needed for economical operation of the agricultural tracts. It is frequently uneconomical, however, for each of the homesteaders to attempt to purchase or lease such machinery. It is contemplated to have such machinery purchased by the co-operative and made available for use by all homesteaders as needed.)"

"7. May the Corporation build, equip and convey to the co-operative of homesteaders a school building? May the Corporation make a gift of such completed school building to the co-operative of homesteaders? (Frequently the local county or township is not in financial position to build and equip a needed school building for the community, and existing school facilities may be totally inadequate to meet the increased demand. If such a building can be supplied without cost to the county, the county will frequently be willing to pay the salaries of teachers and to meet other operating expenses.)"

"8. May the Corporation build and equip a community house, containing study rooms, reading rooms, assembly hall, kitchen, and similar facilities, and then convey such community house to the co-operative of homesteaders? May the Corporation make a gift of such community house to the co-operative of homesteaders?"

In my opinion of July 18, 1934 [38 Op. 3], I stated, with respect to the furnishing of roads, school facilities, police protection, fire protection and the like: "The occupants of the homesteads will be entitled to such police and fire protection as may ordinarily be provided by the state, county or municipality for communities similarly situated; will be entitled to use the public schools and the public roads; and will be entitled to have their needs for such facilities considered by the local authorities in like manner as other citizens. To the extent that the Corporation must supply a facility it may contract therefor."

Concerning live stock, tools, implements, seed, fertilizer, and household furnishings and furniture, I stated, in the same opinion: "It is necessarily true that some of the aided families will be without certain of the articles enumerated

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and will be without financial means to supply them. To place them thus within four bare walls and on an uncultivated plot of ground would conceivably fall short of providing 'subsistence homesteads' which they are to occupy and which they are to be assisted in holding and acquiring as their own property. I therefore conclude that the Corporation may make loans for the purchase of the items named, or may itself purchase and resell them to the occupants of the homesteads, when determined to be reasonably necessary in order to carry out the purposes of the statute, and assuming that such regulation as may be issued comes within its terms."

The furnishing of some of the items concerning which you now ask my opinion has thus been previously considered. The others are controlled by the same principles and, if administratively determined to be "reasonably necessary in order to carry out the purposes of the statute," may be provided by valid regulation.

My conclusion applies equally to the tract of land for common use described in Question No. 2. A right in a noncontiguous plot does not constitute part of the "homestead" under the homestead exemption laws as applied in some states; in other states the contrary view prevails. Thompson on Homestead and Exemption, Sec. 145; Ruling Case Law, Homestead, Sec. 40. Even assuming, however, that neither the common plot nor any interest therein may be considered part of a technical homestead, it may be provided, if necessary, under the principles hereinbefore stated.

The statute authorizes the President to act "through such agencies as he may establish." If it is administratively determined to establish a co-operative association as an agency for the execution of a subsistence homesteads project, a loan necessary in order to enable the association to operate is permissible and within the principle of the opinion of March 19, 1934, approving a proposed loan to the Virgin Islands Company, wherein it was stated that "a loan coupled with an obligation on the part of the Corporation to assist prospective homesteaders to establish and buy homesteads and to furnish them with part-time employment and substantial assurance of profit from crops grown by them, reasonably comes within the discretion conferred

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upon the President." The association may be employed to hold the title to, or possession of, land and personalty devoted to common use.

However, the foregoing conclusions are subject to the condition that any property conveyed to the cooperative association for common use of the homesteaders will be paid for either by the homesteaders or by the association. I concur in the conclusion of your Solicitor that Congress did not contemplate gratuitites. The statute specifically authorized "loans" and provided that "the moneys collected as repayment of said loans shall constitute a revolving fund to be administered as directed by the President for the purposes of this section." The making of gifts without limit (and if the power exists there is no limit clearly indicated) is repugnant to the idea of a revolving fund.

"5. May the Corporation make a loan to a private industry for operating capital where part of the consideration for such loan will be an undertaking by the borrower to employ the homesteaders so as to supply them with a source of cash income? May the Corporation sell or lease a small tract of land to such an industry? (Some such inducement is frequently necessary to induce an industry to locate near the subsistence homestead community.)"

I agree with the conclusion of your Solicitor that a loan to a private industry for the purpose stated appears to have too remote a relation to "aiding in the purchase of subsistence homesteads" and is, therefore, unauthorized.

With respect to providing a site for such an industry, this land is not subject to the ordinary rules applicable to public land, having been acquired with definite purpose of subsequent alienation, and the public ownership being only a temporary incident in the establishment of a community of privately-owned homesteads. If the presence of an industry within the homestead area is essential to the successful establishment and maintenance of the homestead project, there is implied authority to sell the necessary site. A lease to such an industry would be authorized equally and for like reasons; but with respect to this it appears proper to add that Congress hardly contemplated any arrangement which would leave the United States in the position of landlord during a long-continued and indefinite period.

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"9. May the Corporation set aside a small number of homestead tracts to be leased to teachers, social workers, and professional technicians? (It is frequently desirable to include in the community individuals who can render special services, but who do not wish to become permanent homesteaders. Such special services are those which teachers, social workers, agricultural experts, and others, may provide. It would be desirable to secure their residence within the community by leasing homes to them from year to year.)"

This question is controlled by the same principles set forth above in connection with Question No. 5 and is likewise answered affirmatively.

"10. After a community plan has been laid out for the establishment of a subsistence homestead community, may the Corporation convey to the local counties, or dedicate to the public, the following: roads, streets, walks, parks, and parkways, which have been constructed with moneys made available in Section 208? (After such dedication, the expense of maintenance is assumed by the local authorities.)"

This question is answered affirmatively. I do not regard such dedication as necessarily representing a gratuity. It more nearly approximates the transfer of a liability, properly assumable by the local authorities. Roads and streets, at least, are indispensable and it is hardly to be supposed that they are to be owned and maintained indefinitely by the United States in a community of private citizens who, as pointed out in the opinion of July 18, 1934 [38 Op. 3], will have the political status of residents of the states and of the subdivisions thereof in which they live, with the right to have their needs for roads, schools, etc., considered by the local authorities in like manner as other citizens.

"11. Should moneys paid to the Corporation by homesteaders as interest on amortization or on advances made by the Corporation, be deposited to the credit of the revolving fund created in Section 208, or should such payments be covered into the Treasury as 'miscellaneous receipts'?"

The Comptroller of the Treasury, in an opinion of October 21, 1919, 26 Comp. Dec. 295, stated the following rule: "The authority to maintain a revolving fund is authority

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to maintain it at its principal * * *. There is no purpose disclosed in the authority for a revolving fund that it shall increase its principal. Profits may be so involved in some revolving funds as to be impracticable of such accurate determination as to separate them immediately from the principal, but where the increment is definite and periodic. as a payment of interest, there authority should appear to augment the principal thereby. * * * Such moneys belong to other accounts, and there being none provided aside from miscellaneous receipts, the interest * * * must be deposited in miscellaneous receipts."

This rule has also been applied in later cases (1 Comp. Gen. 656; 12 id. 553), and I approve it as applicable here, both because it appears to be supported by sound reason and because it is rather to be presumed that Congress intended a "revolving fund" as theretofore understood.

"12. Where part of the land which has been acquired cannot immediately be used by the Corporation for building or other operations, may such land be temporarily leased by the Corporation? Should the rentals from such leases be deposited to the credit of the revolving fund or covered into the Treasury as 'miscellaneous receipts'?"

There have been numerous instances during many years in which private persons have been permitted to occupy government land, not immediately required for public purposes, by administrative action. (16 Op. 205, 210; 19 id. 628; 22 id. 240, 544.) The Act of May 25, 1926, c. 380, 44 Stat. 630, 634, specifically provided for the temporary renting of improved parcels purchased for ultimate use as public building sites. Section 203 of the National Industrial Recovery Act authorizes the leasing of property acquired in connection with public works projects. Section 208, relating to subsistence homesteads, contains no such express authority, but, as pointed out in the opinion of March 19, 1934, its provisions are broad and general, with strong indication of a purpose to leave the President unrestricted by presumptions which might ordinarily arise from detailed provisions inserted in the Act and limited by its arrangement to other projects. For these reasons I conclude that land purchased for subsistence homesteads sites but not immediately required may be temporarily leased.

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The rentals received under such leases would represent definite and periodic increments, under the rule hereinbefore stated, and should be deposited in the Treasury as "miscellaneous receipts."

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

CAUSE OF DEATH OF CERTAIN NONCOMMISSIONED OFFICER OF THE ARMY

A soldier suffering from syphilis was admitted to a post hospital and given intravenous injections of neo-arsphenamine and bismuth salicylate at various intervals. The soldier died, and a Military Board of Inquiry found that his death was due to reaction from the neo-arsphenamine injected during treatment, and that the treatment was given in a proper manner with the usual safeguards and by proper authority. There was no finding as to how the disease was acquired.

Held, the soldier's death was not proximately caused by his own misconduct and did not "result" from such misconduct within the contemplation of the act of December 17, 1919, ch. 6, 41 Stat. 367.

DEPARTMENT OF JUSTICE,
September 10, 1934.

SIR: I have the honor to comply with your request of July 16 for my opinion upon the question hereinafter indicated.

A non-commissioned officer of the army was admitted to the post hospital at Fort Bragg, N. C., on December 17, 1933, and found to be suffering from syphilis. He was given intravenous injections of neo-arsphenamine and bismuth salicylate, and remained in the hospital until January 3, 1934, when he returned to duty. The treatment was then continued at weekly intervals, the last treatment being given on January 12, 1934. Three days later he was readmitted to the hospital and remained there until his death on February 15, 1934.

A Military Board of Inquiry found that the soldier's death was "due to reaction from neo-arsphenamine, the direct result of intravenous treatment undertaken for the purpose of rendering him more fit to perform his military duties," and that "the treatment was given in a proper manner with the usual safeguards and by proper authority." It

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also indicated a conclusion, apparently of law rather than of fact, that the man's death was "not the result of his own misconduct." There was no finding as to the manner of acquisition of the disease.

The Judge Advocate General, assuming misconduct origin of the disease, has concluded that the soldier's death was the "result of his own misconduct," within the meaning of the words as used in the Act of December 17, 1919, c. 6, 41 Stat. 367 (U. S. C., Title 10, Sec. 903), and upon this precise question you have asked my opinion.

The Act of December 17, 1919, provides—

"that hereafter, immediately upon official notification of the death from wounds or disease, not the result of his own misconduct, of any officer or enlisted man on the active list of the Regular Army or on the retired list when on active duty, the Quartermaster General of the Army shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child to any other dependent relative of such officer or enlisted man previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death. * * *" (41 Stat. 367).

Upon inquiry at your Department, I am informed that it has long been the practice to presume misconduct origin of syphilis unless an affirmative contrary showing is made and that this practice is supported by the following provisions contained in Army Regulation No. 40–1030:

"Unless the patient can show by satisfactory evidence that the primary venereal infection was innocently acquired, all cases of paresis, tabes dorsalis, and other conditions which are unmistakably the result of venereal infections will be recorded as not in line of duty. The inability of the responsible medical officer to prove misconduct in the case, or to obtain information in regard to the primary or secondary symptoms of syphilis, is not sufficient to warrant the opinion that the early or late symptoms resulting therefrom originated in the line of duty. * * *

"The word 'misconduct' as used in the act of Congress approved May 17, 1926, relates to forfeiture of pay on ac-

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count of time lost from venereal diseases and does not govern the line of duty. While all cases of disease due to misconduct are necessarily not in line of duty, many which are not due to misconduct, or which do not fall within the purview of the act of May 17, 1926, for which there is consequently no stoppage of pay are, however, not in the line of duty for other reasons."

I find no occasion to consider the propriety of the indicated presumption since my conclusion is not affected thereby.

The Judge Advocate General has considered the case to be controlled by an opinion of Judge Advocate General Crowder of December 27, 1913, wherein it was concluded, under similar circumstances, that the disease was the proximate cause of death and that death therefore resulted from misconduct. However, in another similar case Acting Judge Advocate General Kroger reached a contrary conclusion (opinion June 17, 1919), stating that "whether or not the disease treated was due to his misconduct is not material, for such misconduct was not the proximate cause of his death; the proximate cause of his death was acute arsenical poisoning." In this, although he made no reference thereto, he adopted a view previously accepted in the Navy Department.

There is some discussion in the various opinions as to whether a soldier is performing a duty in submitting to the treatment. Judge Advocate General Crowder stated that he was unable to discern any element of duty. The Acting Judge Advocate General of the Navy stated unqualifiedly in an opinion of April 29, 1918, that a member of the naval personnel, in taking the treatment, "was in a duty status and was doing that which was required of him by the law and regulations." Whether or not the taking of the treatment may be considered a "duty" within some particular sense, it is apparent that submission thereto is required and cannot be avoided except, perhaps, through such wilfulness as would be cause for punishment by court martial. The following provisions of Army Regulation No. 40–235 are pertinent:

"Any individual who, having failed to take prophylactic treatment after illicit sexual intercourse, develops venereal

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disease as a result of such intercourse will be brought to trial by courtmartial for neglect of duty. * * *

"Every case of venereal disease will be promptly subjected to treatment, but not necessarily excused from duty unless, in the opinion of the surgeon, it is considered desirable. * * *"

Assuming that the man had been guilty of punishable misconduct, he was subject to such disciplinary measures as might lawfully be taken. He was also subject to the 107th Article of War (Act June 4, 1920, c. 227, 41 Stat. 759, 809; U. S. C., Title 10, Sec. 1579), requiring an enlisted man to serve beyond his ordinary enlistment period in order to make up time lost "through disease or injury the result of his own misconduct." He continued, however, to be a member of the military establishment, subject to its requirements and to the orders of his superior officers.

If committed to the guard house, or to the hospital, and there killed through a mishap his death would not "result" from the misconduct which had brought about his presence there at the particular time. (36 Op. 478, 479.) As pointed out in the cited opinion, the word "result" indicates a necessary relation of cause and effect. The same principle was applied in the administration of the statute providing for vocational training of disabled war veterans and providing compensation for death or injury "resulting" from such training. (35 Op. 76; 36 id. 61.)

Attorney General Cushing (7 Op. 149, 164) made the following pertinent observations concerning injuries received and diseases contracted by members of the military establishment while under restraint on charges of misconduct:

"In regard to arrest, again: suppose that on march, in camp or garrison, or on a voyage, an officer is put in arrest on charges. In the first place, those charges may not be substantiated, and then it would be manifestly unjust that the mere fact of his being charged should operate to deprive himself or his family of pension. Or, while he is in arrest, he dies of camp fever or ship fever, and then it is unjust to presume a criminality not proved in the course of law. Or, whether guilty or not, if he die of wounds, casualty, or dis-

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ease contracted while in arrest, still the death is not the consequence of the arrest, but of the public service. If not dying in arrest, and on trial being convicted and sentenced, that sentence be of death or dismissal for some grave military crime, that of course terminates the question of pension; but if his offence be a light one, with a sentence of reprimand, for instance, and he shall have happened to contract disability or mortal disease while in arrest, as by the hazards of a long march or voyage, it seems not just to add to his legal sentence the serious indirect aggravation of incapacity of pension. All these difficulties are avoided or conciliated by directing inquiry to the question—Was the cause of disability or death, or was it not, an act of his official military duty? "

Attorney General Palmer approved these observations and applied the same principle, when interpreting a later statute in 32 Op. 12, 24.

We may say, from the foregoing, that if a man is confined in the guard house and there contracts a disease which he would not otherwise have acquired the disease is, nevertheless, not to be attributed to the misconduct which induced his confinement; and I perceive no reason for a distinction, in this respect, whether the illness is contracted through an infection, contaminated food, improper medicine, or medicine which the particular patient could not tolerate, as in this instance. *A fortiori* the principle would apply to confinement in a hospital, where the man has been admitted for treatment, not for punishment.

Your Department appears to recognize that if some fault in the treatment of the patient were established the consequent death would be attributable to the fault, rather than to the illness for which the patient was being treated. Here the apparent situation is that the patient was given treatment which in most cases would be effective but which in his case was highly injurious.

" The arsenobenzene preparations [known in America as arsphenamines] are not tolerated equally well by all patients. In a minute percentage of cases they may cause death by damaging the small vessels of the brain or the

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kidneys. Other toxic effects are jaundice, and an inflammation of the skin (either of which may be fatal) and a variety of minor troubles. Serious effects from arsenobenzene injections are, however, far too rare to counteract their very great advantages." (Encyclopaedia Britannica, 14th ed., Article on "Salvarsan.")

Again, if the death had been caused by ptomaine poisoning it would hardly be necessary to establish negligence on the part of the cook in order to warrant a conclusion that the death "resulted" from the poisoning rather than from the "misconduct" which originally set in motion the chain of events; and this, I think, would be no less true if the infected food were specially prepared for the particular patient and peculiarly required because of his ailment. I perceive no reason whatever for taking a different view when medicine, or medical treatment, produces death, as the Board in this case affirmatively found.

I recognize the possibility that in a negligence case one whose act or omission had proximately caused a disease might have to answer for an aggravation flowing from its treatment, but the interpretation of the Act of Congress here involved is not controlled entirely by the principles applicable when determining the measure of damages allowable in such cases. The same principles would be applicable in cases of false arrest and imprisonment, but this consideration did not lead my predecessors to any harsh and narrow view when determining whether disabilities contracted during imprisonment in the army "resulted" from the misconduct which had induced the imprisonment, as indicated by the opinions hereinbefore mentioned.

Considering the foregoing, I have the honor to advise you that, in my opinion, the soldier's death, in the case submitted by you, was not proximately caused by his own misconduct and did not "result" from such misconduct, within the contemplation of the Act of December 17, 1919. All original documents inclosed with your letter are returned herewith.

Respectfully,

HOMER CUMMINGS.

Incl. 482051.

To the SECRETARY OF WAR.

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PAYMENT OF LOSSES OF UNITED STATES EMPLOYEES IN UNION OF SOVIET SOCIALIST REPUBLICS DUE TO APPRECIATION OF CURRENCY OF THAT COUNTRY IN RELATION TO THE AMERICAN DOLLAR

Although purchases made by employees of the United States in the Union of Soviet Socialist Republics are paid for with American dollars, nevertheless, by reason of the fact that prices are quoted in terms of, and payable at the rate of exchange for, the theoretical, nonexistent gold ruble, such employees sustain actual losses due to the appreciation of a foreign currency in its relation to the American dollar; and payment of such losses is authorized under the act of March 26, 1934 (Pub. No. 129, 73d Cong.; [48 Stat. 466]), and Executive Order No. 6657-A of March 27, 1934, issued pursuant thereto.

Under the provisions of the Act of March 26, 1934, *supra*, the question as to what constitutes loss thereunder is solely for the determination of the President, and the Comptroller General is without jurisdiction in the matter. (See Executive Order No. 6850 of September 18, 1934.)

DEPARTMENT OF JUSTICE,
September 14, 1934.

SIR: I am herewith transmitting through the Secretary of State a proposed Executive order prepared in the State Department and submitted for my consideration by the Acting Director of the Bureau of the Budget under date of September 12, 1934, amending Section 3 of Executive Order No. 6657-A of March 27, 1934, entitled "Regulations for payment of losses sustained by officers, enlisted men, and employees of the United States in foreign countries due to appreciation of foreign currencies in their relation to the American dollar."

Assistant Secretary of State Moore in his letter of September 11, 1934, to the Acting Director states that the necessity for the proposed amendment is due to several decisions of the Comptroller General of the United States under dates of July 27, August 9, and August 31, 1934 (A-56761), to the effect that Executive Order No. 6657-A does not authorize reimbursement to officers and employees of this Government in the Union of Soviet Socialist Republics for losses sustained on account of the appreciation of local currency in its relation to the American dollar.

The Act of March 26, 1934 (Public No. 129, 73d Congress), pursuant to which the Executive Order was issued, provides:

"That there are authorized to be appropriated annually such sums as may be necessary to enable the President, in

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his discretion and under such regulations as he may prescribe and notwithstanding the provisions of any other Act and upon recommendation of the Director of the Budget, to meet losses sustained on and after July 15, 1933, by officers, enlisted men, and employees of the United States while in service in foreign countries due to the appreciation of foreign currencies in their relation to the American dollar, * * * *Provided*, That such action as the President may take shall be binding upon all executive officers of the Government: * * *" (48 Stat. 466).

Paragraph numbered 5 of Executive Order No. 6657–A is as follows:

"From and after the effective date of this order, each employee shall be entitled to receive in foreign currency such amount as he would have received by converting into such foreign currency, at the basic rates specified in section 4, his net salary and net allowances, or his net pay and allowances, as provided in section 3."

It appears that the Union of Soviet Socialist Republics maintains for purposes of accounting a monetary unit (nominally based on the theoretical gold content of the ruble) which is used as a basis for establishing the ruble exchange rate of foreign moneys but which is actually nonexistent as a currency. Prices of commodities and services are quoted in gold rubles, but payment is required to be made in foreign currencies at the rate for the gold ruble. Hence, purchases by officers and employees of the United States Government in the Union of Soviet Socialist Republics are actually paid for with American dollars. Although there is a circulating medium in the form of a paper ruble, it is available officially to foreigners only at the gold ruble rate of exchange, and it is of limited utility for the reason that it is not acceptable for purchases made in the Torgsin stores especially established for foreigners for the purchase of food, clothing, and other necessities.

With respect to such transactions, the Comptroller General holds in his decision of August 31, as follows:

"* * * In so far as this office is concerned there appears involved only the allowance of a payment for fictitious losses, that is to say, a loss by exchange which was never

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incurred for the reason that payments generally are made in United States dollars, which would be contrary to the provisions of the act of March 26, 1934, and the Executive orders issued by the President in pursuance thereof. Whether the payment in United States currency is based upon a price fixed in Russian gold ruble and converted at the time of the purchase, or payment, does not appear to be material under said law and Executive orders. The losses contemplated thereunder are actual losses as distinguished from fictitious losses which it is understood are involved in the Russian matter. In the final analysis, it must be considered that if payment is made in United States currency, the manner or means whereby the price to be paid in such currency is ascertained is not material, the law and Executive Orders in relation to this matter contemplating compensation for exchange losses but no provision is made when no conversion is necessary in the foreign country."

I am unable to agree with the views of the Comptroller General. In the first place, the statute does not require conversion in any respect, and the Executive order requires only that losses be computed on the *basis* of conversion. The statute authorizes reimbursement of losses " due to the appreciation of foreign currencies in their relation to the American dollar." The Executive order (paragraph numbered 5) provides that employees shall be entitled to receive in foreign currency such amount *as he would have received* by converting his salary, etc., into such foreign currency. However, when the employee pays in American currency for a commodity or service, the price of which is computed and quoted (although not payable) in terms of the gold ruble, there is for all practical purposes a conversion of American currency into the gold ruble. Since the evident purpose of the Executive order and the statute pursuant to which it was issued, is to authorize reimbursement for losses sustained on account of the appreciation of foreign currencies in relation to the American dollar, it is immaterial that the gold ruble is a *non-circulating* currency.

In the second place there is no doubt that actual losses are sustained by reason of the transactions involved. Paragraph numbered 4 of the Executive order, which pre-

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scribes the basic exchange rates for computation of losses, designates the ruble as the monetary unit of the Union of Soviet Socialist Republics, and fixes the basic rate of exchange at 51.74 cents. This figure represents the value of the ruble in American currency before the devaluation of the gold dollar. The present value of the ruble, I am informed by representatives of the State Department, is approximately 88.59 cents. Hence, there is an appreciation of the ruble in relation to the dollar of approximately 71 percent, and the difference between the former and the present value of the ruble in terms of the dollar represents the loss sustained by officers and employees of this Government in purchasing goods and services in the Union of Soviet Socialist Republics and paying for them in American currency.

It is also my opinion that the question as to what constitutes losses within the meaning of the statute is a matter solely for the determination of the President. The statute provides that "such action as the President may take shall be binding upon all executive officers of the Government." By this provision the President is made responsible only to the Congress for such action as he may take in carrying out the purposes of the statute. Nor is the authority of the President under this Act in any wise affected by the language of the appropriation made by the Congress for carrying out the purposes of the Act (Sec. 5, Public No. 268, 73d Congress; [48 Stat. 834]). Hence, the Comptroller General is without jurisdiction to determine whether losses for which the President has authorized reimbursement are allowable under the terms of the statute.

However, in view of the ruling of the Comptroller General in the matter, and the fact that in all probability the Comptroller General would in the absence of any further order by the President disallow any payments made for such losses, with consequent embarrassment to the State Department, I believe it desirable that the proposed order, which specifically authorizes the reimbursement of such losses as those incurred under the circumstances above set out, be issued.

Your attention is invited to the fact that the order is made retroactive to April 1, 1934, the effective date of the order

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which it amends. The effect of this provision is to make the original order read in its amended form as of April 1, 1934.

The proposed order has my approval as to form and legality.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

GUARANTY BY UNITED STATES OF BONDS OF HOME OWNERS LOAN CORPORATION AND FEDERAL FARM MORTGAGE CORPORATION

The Home Owners Loan Act of 1933, as amended, and the Federal Farm Mortgage Corporation Act authorize, respectively, the Home Owners Loan Corporation and the Federal Farm Mortgage Corporation to issue bonds in prescribed amounts and provide, "Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States", and all bonds issued thereunder recite that they are so guaranteed.

Held, if either corporation should default in payment of either principal or interest when due, the United States would thereupon become obligated to make such payment, and its obligation would not be conditioned upon the institution of any proceeding by the bondholder against the corporation.

DEPARTMENT OF JUSTICE,
September 14, 1934.

SIR: I have the honor to comply with your request of this date for my opinion upon the question hereinafter indicated.

The Home Owners' Loan Act of 1933, as amended by the Act of April 27, 1934, authorized the Home Owners' Loan Corporation to issue bonds in a prescribed amount [48 Stat. 643]. The Federal Farm Mortgage Corporation Act, approved January 31, 1934 [48 Stat. 344], likewise authorized the Federal Farm Mortgage Corporation to issue bonds in a prescribed amount. Each statute contained the following provisions:

"Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof * * *. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest

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on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds."

All bonds issued thereunder recite upon their face, over the signature of the Secretary of the Treasury, that "This bond is fully and unconditionally guaranteed both as to interest and principal by the United States."

You state that "the Treasury regards this guaranty, in each case, as a guaranty of payment, not merely of collection", with the effect that "should either corporation fail to pay upon demand when due the principal of, or interest on, its obligations issued under the sections referred to, the United States would be obligated to make such payment immediately without requiring the respective holders first to proceed against the defaulting corporation;" and you request my opinion concerning the correctness of your conclusion.

Of course, as you point out, no such failure has arisen and probably never will arise; and it might be said that there is pending before you no question upon which my opinion may properly be requested. However, I acquiesce in your view that it is in the interest of the United States, as the sole stockholder in each of these corporations as well as the guarantor of their obligations, to have the question decided now.

The guaranty of principal and interest is a guaranty of payment. *Greysonia-Nashville Lumber Co.* v. *Goldman*, 247 Fed. 423, 427. Between private parties, at least, if the guaranty is "unconditional" the obligation of the guarantor arises immediately upon failure of the debtor to pay according to the terms. *First National Bank* v. *Jones*, 219 N. Y. 312, 315.

The guaranty being stated by the statute as full and unconditional, there is no occasion to consider whether a condition should be implied. The separable provision that the Secretary of the Treasury shall pay if the corporation is unable to pay upon demand is no part of the guaranty, but

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merely a provision for carrying it out in the only reasonably conceivable contingency that would require such action.

Considering the foregoing, it is my opinion that if either corporation should fail, upon demand by a bona fide and accredited holder, to pay either principal or interest when due, the United States would thereupon become obligated to make such payment and its obligation would not be conditioned upon the institution of any proceeding by the bondholder against the corporation.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

AMENDMENT OF CIVIL SERVICE RULE VII GOVERNING CERTIFICATION

Section 165 R. S., providing that women may, in the discretion of the head of any department, be appointed to any clerkship therein upon the same requisites and conditions prescribed for men, has not been repealed by the Civil Service Act; and the President is without authority under that Act to amend paragraph (a) of section 1 of Civil Service Rule VII, governing certification, by requiring that certification shall be made without regard to sex unless sex is specified in the request and the request is approved by the Civil Service Commission. (See Executive Order No. 6866 of October 5, 1934.)

DEPARTMENT OF JUSTICE,
September 17, 1934.

SIR: I am herewith returning the proposed Executive order submitted by you under date of September 13, 1934, amending paragraph (a) of Section 1 of Civil Service Rule VII, governing certification.

The proposed order eliminates the final sentence of paragraph (a) "Certifications shall be made without regard to sex unless the nature of the duties of the position to be filled are such as, in the opinion of the Commission, can be performed only by men or women as the case may be", and substitutes therefor the sentence "Certifications shall be made without regard to sex unless sex is specified in the request, and the request is approved by the Commission."

The present final sentence was inserted in Rule VII by the President on December 23, 1932, upon the recommenda-

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tion of a majority of the Civil Service Commissioners. At the time of the amendment the last sentence provided that "Certifications shall be made without regard to sex unless sex is specified in the request." This rule was based on the provisions of Section 165 of the Revised Statutes, which, as now embodied in Section 33, Title 5 of the United States Code, is as follows:

"Women may, in the discretion of the head of any department, be appointed to any of the clerkships therein authorized by law, upon the same requisites and conditions, and with the same compensations, as are prescribed for men."

The Congress has by this statute vested in appointing officers certain discretionary authority. In an opinion of June 28, 1934, the Attorney General advised the President that since the Congress had vested in the Land Bank Commissioner discretionary authority to make appointments without regard to the Civil Service Law and Rules, the President was without authority to control that discretion by placing the positions involved in the classified civil service so as to require appointments thereto to be made in accordance with the Civil Service Law and Rules. The principle thus stated is applicable to the instant case. Since the present rule transfers to the Civil Service Commission the discretion vested in appointing officers by Section 165 of the Revised Statutes, it and also the proposed amendment, insofar as it makes certifications subject to the approval of the Commission, are invalid unless Section 165 of the Revised Statutes has been repealed by the Civil Service Act of January 16, 1883 (c. 27, 22 Stat. 403). I am of the opinion that it has not been so repealed.

Section 165 provides that women may, in the discretion of the head of any department, be appointed to any clerkship therein upon the same requisites and conditions as are prescribed for men. The Civil Service Act authorizes the President to promulgate rules or, in other words, to prescribe the "requisites and conditions" for the admission of persons into the Civil Service of the United States. The Act makes no distinction as to sex but deals generally with persons and positions. This would seem to indicate that the Congress itself did not intend to authorize the President to

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make any such distinction. In my judgment, the two statutes are consistent and should be read together. This view is supported by the administrative construction of the two statutes which obtained for many years prior to the amendment of Rule VII on December 23, 1932.

In view of the foregoing, I suggest that the words of the proposed amendment "and the request is approved by the Commission" be deleted so that the sentence will read as it was prior to the amendment of December 23, 1932, "Certifications shall be made without regard to sex unless sex is specified in the request."

I have revised the proposed order to read accordingly, and, with this change, it has my approval as to form and legality.

Respectfully,

HOMER CUMMINGS.

To the ACTING DIRECTOR OF THE BUDGET.

RATING REQUIRED FOR MILITARY PREFERENCE WHEN REDUCTIONS IN FORCE ARE MADE—COMPETING EMPLOYEES

An employee in the field service of the Department of Agriculture must receive a minimum efficiency rating of 80 to be entitled to a rating of "good" for military-preference purposes when reductions in force are made.

A junior veterinarian assigned to Chicago, Ill., station of the Bureau of Animal Industry is to be considered as in competition only with other employees at that station.

DEPARTMENT OF JUSTICE,
September 21, 1934.

SIR: I have the honor to comply with your request of September 14 for my opinion upon the following questions:

"(1) If it is administratively decided to reduce the force of junior veterinarians assigned to the Chicago, Illinois, station of the Bureau of Animal Industry, has the Department the right to effect the separation of a junior veterinarian at that point who is entitled to military preference and whose record is rated as good when junior veterinarians who are not entitled to military preference are being retained at various other stations throughout the country? In other words, must consideration be given to all junior veterinarians

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in the field service, or may such consideration be limited to the Chicago station?

"(2) There is also some question as to what constitutes a record which is rated as 'good' for a field employee who is entitled to military preference. Section 1 of the Executive Order of June 4, 1925, states that in the departmental service military-preference employees will be placed at the top of the lists of competing employees in the order of their ratings provided they attained for the last rating period an efficiency rating of not less than 80. It would seem fair to consider field employees on the same basis as departmental employees, but as the two Acts above quoted make no reference to efficiency ratings, it will be appreciated if you will also render an opinion as to whether a military-preference employee in the field service must receive a rating of 80 in order to have a record which is rated as good."

The right of military preference in such a case depends upon the statutes and executive orders hereinafter indicated.

Act of August 15, 1876, c. 267, 19 Stat. 143, 169 (U. S. C., Title 5, Sec. 37):

"That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors."

Act of August 23, 1912, c. 350, 37 Stat. 360, 413 (U. S. C., Title 5, Sec. 648):

"The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia * * *. That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary."

Executive Order of March 3, 1923, as amended by the Executive Order of March 2, 1929 (Civil Service Rule XII, Par. 5):

"5. In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified

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service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good, or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service."

Executive Order of June 4, 1925 (Civil Service Commission Report, 1925, p. 115):

"The following rules are hereby prescribed to govern the selection of employees for demotion or separation from the departmental service on account of reduction of force.

"Employees eligible for military preference: 1. Executive Order of March 3, 1923, will be construed to require that in selecting employees to be demoted or separated on account of any reduction of working forces honorably discharged soldiers, sailors, and marines, and the widows of such, and the wives of injured soldiers, sailors, and marines, who themselves are not qualified for positions in the Government service, will be placed at the top of the lists of competing employees, in the order of their ratings, provided they attained for the last rating period an efficiency rating of not less than 80; and they will be retained in existing status, if their record in respect to deportment, attitude and attendance is satisfactory, in preference to all other persons with whom they are respectively in competition."

Previously to the issuance of the last mentioned order (No. 4240), Attorney General Stone had advised the President (34 Op. 159, 161):

"The law does not contemplate that the method of determining the efficiency of honorably discharged soldiers and sailors shall be different from the method of determining the efficiency of other persons in the classified service. The ratings or degrees of efficiency are to be determined by the Bureau of Efficiency and the methods by which the Bureau shall reach its determination are within its sound discretion. That discretion cannot be controlled by the courts. *Medkirk* v. *United States*, 45 Ct. Cls. 395, 401; *Keim* v. *United States*, 33 Ct. Cls. 174; 177 U. S. 290, 295.

"When employees in the classified service have been rated as to efficiency, and their comparative degrees of efficiency established, such as 'excellent,' 'good,' 'fair,' or 'poor,'

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or such other system of classification as may be determined on by the Bureau, then, when it becomes necessary to reduce the force in any of the executive departments, all honorably discharged soldiers and sailors whose records in said departments are rated 'good,' or its equivalent, shall be retained in the service, without reduction in rank or salary, in preference to other classified employees serving in the same office or department. That is the evident intent of the statute and the Executive Order issued in pursuance thereof."

The effect and evident purpose of the order of June 4, 1925, was to prescribe 80 as the lowest percentage rating entitled to be considered as "good."

Your Solicitor has concluded that this order "applies to the departmental service and is therefore restricted to the employees in Washington." Whether or not the inference contained in this statement, concerning the limited application of the term, "departmental service," is correct I find no occasion to consider.

The Order of March 3, 1923, extended the military preference provision to the entire "classified service," which is defined by Civil Service Rule II as comprehending "all officers and employees in the executive civil service of the United States" save persons and positions excepted by law or valid regulation, and includes "the classified employees of the several executive departments outside of Washington" (26 Op. 209, 214; 27 id. 184, 192). The order of June 4, 1925, construed the word "good," employed in the earlier order, as requiring a minimum rating of 80. It did not provide that the construction should prevail only in the service at Washington, and the particular paragraph stating the construction cannot be read with such limited meaning. Neither the President nor Congress could have intended that "good" should indicate varying degrees of efficiency, dependent upon geographical considerations or branch of the service.

In any event, the definition of the Executive order is reasonable and consonant with common understanding, and, as I am informed, has been generally observed throughout the classified service. I approve it and, therefore, conclude that an employee in the field service of the Department of Agriculture must receive a minimum percentage rating of

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80 in order to warrant a rating of "good" for purposes of military preference.

Answering your other question, I concur in the conclusion of your Solicitor that the employee is to be considered as in competition only with other employees at the Chicago Station, within the contemplation of the Executive order relating to military preference. This view, as I am also informed, has been generally accepted and applied, and a strong presumption of correctness attaches to the administrative construction thus evidenced. Furthermore, the contrary view would be highly impracticable of application, requiring the transferring of employees from one station to another, perhaps far distant, in order to accomplish a reduction in force in a single office. In fact, an absurdity would be produced if the reduction in force were required by lack of funds and, yet, could not be accomplished without additional expense incident to such shifting of employees.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF AGRICULTURE.

AUTHORITY OF SECRETARY OF AGRICULTURE TO BORROW MONEY FROM THE RECONSTRUCTION FINANCE CORPORATION AND ADVANCE IT TO THE MANAGER OF THE 1933 COTTON PRODUCERS POOL

The Secretary of Agriculture is authorized by section 4 (a) and 5 of the Agricultural Adjustment Act, as amended, to borrow the sum of $20,000,000 from the Reconstruction Finance Corporation, and by section 4 (e) of the Act to advance it to the Manager of the 1933 Cotton Producers Pool for the purpose of enabling him to make an additional distribution or loan of two cents a pound on the cotton in the Pool to the Pool members

DEPARTMENT OF JUSTICE,
September 21, 1934.

SIR: I have your letter of September 13, 1934, in which you request my opinion upon certain questions hereinafter indicated.

It appears from your submission that you propose to borrow approximately $20,000,000 from the Reconstruction Finance Corporation under the authority of section 5 of the

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Agricultural Adjustment Act (c. 25, 48 Stat. 31), as amended by the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (Pub. No. 412, 73d Cong., 48 Stat. 1021), and advance it to the Manager of the 1933 Cotton Producers Pool for the purpose of enabling him to make an additional distribution of 2¢ per pound on the cotton in the Pool to the Pool members.

It further appears that under the authority of section 4 (a) of the Agricultural Adjustment Act, as amended, the Secretary of Agriculture has already borrowed approximately $100,000,000 to refinance the acquisition and carrying of the cotton in the Pool and, under the authority of subsection (e), to advance $40,000,000 of that sum to the Pool Manager to enable him to refinance an advance of 4¢ per pound previously made to the Pool members. By recent order, the Commodity Credit Corporation has increased the loans on both old and new cotton to 12¢ per pound. The proposed action would give Pool members the benefit of this increase.

It is indicated that there is some doubt as to whether the Secretary of Agriculture has sufficient interest in the cotton to secure the loan from the Reconstruction Finance Corporation, and you therefore request my opinion upon the following questions:

"(1) Has the Secretary the necessary authority to secure advances from Reconstruction Finance Corporation, under the provisions of Section 5 of Agricultural Adjustment Act, as amended?

"(2) Assuming that the Secretary has such authority, can he, under the authority given, make the required advances to the Manager, to enable the Manager to make the proposed advance to the holders of Participation Trust Certificates?"

Section 5 of the Agricultural Adjustment Act, as amended provides:

"The Reconstruction Finance Corporation is hereby authorized and directed to advance money and to make loans to the Secretary of Agriculture for the purpose of providing funds with which to enable the Secretary of Agriculture to perform the duties and functions which he is directed or authorized to perform under the provisions of part 1 of this title, *provided such advance of money or such loans shall not*

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be for amounts in excess of the market value of the cotton, or the interest of the Secretary of Agriculture in the cotton, against which the advance or loan is to be made at the time such advance or loan may be applied for by the Secretary of Agriculture, plus costs, expenses, and commissions incurred incidental to handling, carrying, and marketing of such cotton. * * *" [48 Stat. 1059.] [Italics supplied.]

It is to be noted that under the provisions of this section loans or advances which the Secretary of Agriculture is authorized to obtain from the Reconstruction Finance Corporation must not exceed the market value of the cotton, or the interest of the Secretary of Agriculture in the cotton, against which the advance or loan is to be made at the time of application therefor.

It is stated in your letter that the market value of cotton was approximately 13¾¢ per pound as of September 13, 1934, and that the present outstanding indebtedness against the cotton in the Pool is 10¢ per pound. The proposed 2¢ per pound loan would not, therefore, make the total loan in excess of the market value of the cotton, and in this respect the loan would be authorized by the statute.

Under the Pool Agreement the Pool Manager is the designated agent of the Secretary of Agriculture for certain purposes and also the trustee for the Pool members of such right, title, or interest as they may have in the cotton. Legal title to the cotton is, under the agreement, transferred by the Secretary of Agriculture to the Pool Manager but the control of the cotton is retained by the Secretary of Agriculture. Under section 4(a) of the Agricultural Adjustment Act, as amended, the Secretary is authorized to borrow money on all cotton in his control. It follows, therefore, that if his interest in the cotton at the time the application for the loan is made exceeds the proposed loan of 2¢ per pound the loan is authorized.

In view of these circumstances, it is my view that the Pool Manager holds the legal title to the cotton merely as the agent of the Secretary of Agriculture and that the interest of the Secretary is measured by the difference between the market value of the cotton and the total amount of the outstanding liens thereon. Hence, if the market value of the cotton is 13¾¢ per pound, the Secretary's interest is

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3¾¢ per pound, and the proposed loan of 2¢ per pound is therefore authorized.

Your first question is answered accordingly.

The authority for the Pool Manager to make the additional distribution of 2¢ per pound is contained in the proposed amendment to the original Pool Agreement, which Pool members must execute in order to get the advance.

Subsection (e) of section 4 of the Agricultural Adjustment Act, as amended, provides:

"The Secretary of Agriculture is authorized to use in his discretion any funds obtained by him pursuant to the provisions of subsection (a) or (b) of this section or of section 5 for making advances to any agency which may have been or may be established by the Secretary of Agriculture for the handling, carrying, insuring, or marketing of any cotton acquired by the Secretary of Agriculture, to enable any such agency to perform, exercise, and discharge any of the duties, privileges, and functions which such agency may be authorized to perform, exercise, or discharge" (48 Stat. 1059).

In opinion of July 28, 1934, to the Secretary of Agriculture [38 Op. 18], the Acting Attorney General held:

"The Cotton Pool is an agency established for the purpose of handling and carrying cotton, and since the Pool Manager is specifically authorized to make loans and to pledge the cotton, with the approval of the Secretary, it is my opinion that the Secretary is authorized to make the proposed advance to the Pool Manager and that he may re-pledge the cotton to secure the loan thus obtained."

Since the distribution of the loan of 2¢ per pound to Pool members is authorized by the amendment to the Pool Agreement, and since the Secretary is specifically authorized under subsection (e) to advance funds obtained under authority of section 5 to the Pool Manager to enable him to perform, exercise, and discharge any of the duties, privileges, and functions which he may be authorized to perform, exercise, and discharge, your second question is answered in the affirmative.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF AGRICULTURE.

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QUESTIONS ARISING UNDER THE BANKHEAD COTTON CONTROL ACT

There is no authority for the suspension or elimination of the tax levied upon cotton under the Bankhead Cotton Control Act other than that contained in section 2 of that Act.

A finding and proclamation by the President that the economic emergency in cotton production and marketing has ceased to exist would terminate the taxing provisions of the Cotton Control Act with respect to all cotton harvested after the effective date of the proclamation.

Such proclamation made under, and for the purposes of, the Cotton Control Act would have no effect upon operations concerning cotton under the Agricultural Adjustment Act.

DEPARTMENT OF JUSTICE,
September 22, 1934.

SIR: I have the honor to comply with your request of September 18 for my opinion upon the following questions arising under the Bankhead Cotton Control Act, approved April 21, 1934 [48 Stat. 598].

"Is there any legal authority other than that contained in Section 2 of the Cotton Control Act, to suspend or eliminate the tax levied on cotton by that Act?

"If the President finds that the economic emergency in cotton production and marketing has ceased to exist, can that finding be limited to this year's cotton crop and the tax levied thereon, or would such proclamation by the President terminate the operation of the Act?

"If the President proclaims that the economic emergency in cotton production and marketing has ceased to exist, what effect, if any, would that action have on further operations concerning cotton under the Agricultural Adjustment Act including rentals, benefit payments and processing taxes?"

Section 2 of the Act reads as follows:

"SEC. 2. The provisions of this Act shall be effective only with respect to the crop years 1934–1935, but if the President finds that the economic emergency in cotton production and marketing will continue or is likely to continue to exist so that the application of this Act with respect to the crop year 1935–1936 is imperative in order to carry out the policy declared in section 1, he shall so proclaim, and this Act shall be effective with respect to the crop year

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1935–1936. If at any time prior to the end of the crop year 1935–1936, the President finds that the economic emergency in cotton production and marketing has ceased to exist, he shall so proclaim, and no tax under this Act shall be levied with respect to cotton harvested after the effective date of such proclamation" (48 Stat. 599).

There is no other provision for suspending or eliminating the tax levied by the statute and, aside from such authority, there is no power in any executive officer to suspend the operation of a tax levied by act of Congress.

The provision that, upon the prescribed finding and proclamation by the President, "no tax under this Act shall be levied with respect to cotton harvested after the effective date of such proclamation," is apparently clear and, therefore, not subject to construction. Even assuming that resort to construction were permissible, nothing appears which would indicate an intention that the effect of the proclamation and consequent termination of the tax might be limited to this year's crop. I therefore conclude that such a finding and proclamation by the President would terminate the taxing provisions of the statute with respect to all cotton harvested after the effective date of the proclamation.

Answering your third question, it is my opinion that a finding and proclamation by the President of the termination of "the economic emergency in cotton production and marketing," expressly stated to be made under and for the purposes of the Act of April 21, 1934, would have no effect upon the Agricultural Adjustment Act, approved May 12, 1933, which was passed to meet a general economic emergency in relation to agriculture. It provided for termination upon proclamation by the President in the following language:

"SEC. 13. This title shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall by proclamation terminate with respect to any basic agricultural commodity such provisions of this title as he finds are not requisite to carrying out the declared policy with respect to such commodity. The Secretary of Agriculture shall make such investigations and reports thereon to the President as may

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be necessary to aid him in executing this section" (48 Stat. 39).

The Cotton Control Act was passed more than a year later to meet special conditions in connection with cotton and to afford relief beyond and in addition to the relief provided by the earlier statute. It is rather to be assumed that the particular conditions which prompted the passage of the Cotton Control Act either did not exist or were not recognized by Congress as existing at the time of the passage of the Agricultural Adjustment Act; and it is also just as reasonable an assumption that those conditions may cease to exist earlier than the conditions which the Agricultural Adjustment Act was designed to remedy.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF AGRICULTURE.

DELIVERY OF SILVER CERTIFICATES IN LIEU OF SILVER DOLLARS UNDER PROCLAMATION OF DECEMBER 21, 1933[1]

The President is empowered by section 12 of the Gold Reserve Act, amending paragraph (2) subsection (b), section 43 of the Agricultural Adjustment Act, to authorize and direct the Secretary of the Treasury to issue and deliver silver certificates in lieu of silver dollars deliverable under Proclamation No. 2067 of December 21, 1933.

The Secretary of the Treasury may exact seigniorage for the issuance and delivery of such silver certificates.

DEPARTMENT OF JUSTICE,
April 18, 1934.

SIR: I have the honor to refer to your letter of April 10, 1934, in which you state that the practice of a number of persons depositing silver under Proclamation No. 2067 of December 21, 1933, is to accept the silver dollars and then return them to the Mint for silver certificates of equivalent value; that the delay and cost thus entailed have led to a number of requests that depositors be given the option to receive silver certificates. It appears that you intend to request the President for an authorization directing you to cause silver certificates to be issued in lieu of silver dollars

[1] The publication of this opinion was temporarily withheld.

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deliverable under Proclamation No. 2067, and you request my opinion as to whether the delivery of such silver certificates in lieu of silver dollars is subject to any legal objections.

Proclamation No. 2067 is, in part, as follows:

"I, FRANKLIN D. ROOSEVELT, President of the United States of America, do proclaim and direct that each United States coinage mint shall receive for coinage into standard silver dollars any silver which such mint, subject to regulations prescribed hereunder by the Secretary of the Treasury, is satisfied has been mined, subsequently to the date of this proclamation, from natural deposits in the United States or any place subject to the jurisdiction thereof. The Director of the Mint, with the voluntary consent of the owner, shall deduct and retain of such silver so received 50 percent as seigniorage and for services performed by the Government of the United States relative to the coinage and delivery of silver dollars. The balance of such silver so received, that is, 50 percent thereof, shall be coined into standard silver dollars and the same, or an equal number of other standard silver dollars, shall be delivered to the owner or depositor of such silver. The 50 percent of such silver so deducted shall be retained as bullion by the Treasury and shall not be disposed of prior to the thirty-first day of December 1937, except for coining into United States coins." (48 Stat. pt. 2, p. 1724.)

Following the issuance of this proclamation, Congress in Section 12 of the Gold Reserve Act of 1934 [48 Stat. 342], amended Paragraph (2) of Subsection (b) of Section 43 of the Agricultural Adjustment Act of May 12, 1933 (ch. 25, 48 Stat. 31, 52). That part of the amendment material here reads:

"The President, in addition to the authority to provide for the unlimited coinage of silver at the ratio so fixed, under such terms and conditions as he may prescribe, is further authorized to cause to be issued and delivered to the tenderer of silver for coinage, silver certificates in lieu of the standard silver dollars to which the tenderer would be entitled and in an amount in dollars equal to the number of

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coined standard silver dollars that the tenderer of such silver for coinage would receive in standard silver dollars."

It is to be noted that the language of the amendment does not require the President to issue the certificates himself but authorizes him to *cause* them to be issued, and this necessarily implies authority to direct their issuance by another. Hence, it is my opinion that the President is fully empowered to authorize and direct you as Secretary of the Treasury to issue and deliver silver certificates in lieu of silver dollars deliverable under Proclamation No. 2067 of December 21, 1933.

I am informally advised by officials of the Treasury Department that you desire to exact seigniorage for the issuance of silver certificates, and that your request for my opinion was intended to include the question as to your right to do so. Since Proclamation No. 2067 authorizes the deduction of seigniorage for the coinage of silver dollars, and since silver certificates may be issued in lieu of the silver dollars *deliverable under the proclamation*, it necessarily follows that seigniorage may be exacted for the issuance and delivery of such certificates.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

JOINT BID OF PARENT AND SUBSIDIARY COMPANIES FOR THE CONSTRUCTION OF NAVAL VESSELS

The United Shipbuilding and Dry Dock Corporation is a wholly-owned subsidiary of United Dry Docks, Inc., and the officers and directors of the two firms are the same persons. The former submits a bid, in response to Navy Department advertisements, for the construction of two naval vessels, and it is accepted. Accompanying the bid is a copy of an agreement between the two companies providing that if the subsidiary is awarded the contract on its bid, the parent company will furnish the shipyards, equipment, and labor and the subsidiary the material for performance of the contract. The agreement also shows that the two companies intend to share the profits of the contract and be responsible for its performance.

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Held, the bid submitted may be considered as the joint bid of the companies, and, upon proper amendment of the award, they may be made jointly and severally parties to the formal contract.

DEPARTMENT OF JUSTICE,
October 2, 1934.

SIR: I have the honor to acknowledge the letters of September 24 and 26, 1934, with their enclosures, addressed to me by Acting Secretary Roosevelt, in the first of which my opinion is requested upon the question hereinafter stated.

The salient facts, as disclosed by the papers submitted, are as follows:

The United Shipbuilding and Dry Dock Corporation is a wholly owned subsidiary of United Dry Docks, Incorporated. In accordance with the terms of a contract entered into between the two companies, the United Shipbuilding and Dry Dock Corporation, in response to Navy Department advertisements, submitted a bid whereby it offered to construct two torpedo boat destroyers for a specific amount. With the bid there was submitted a copy of the contract entered into between the two companies wherein it was agreed that in the event the contract for the construction of the vessels should be awarded to the subsidiary company, the parent company would furnish the shipyards, equipment and labor (including technical personnel) and the subsidiary would furnish the material necessary to carry out the said contract. With the bid there was also submitted a letter signed by the President of the United Shipbuilding and Dry Dock Corporation wherein the relationship of the two companies was clearly shown, and wherein it was also shown that although United Dry Docks, Incorporated, had filed a petition in bankruptcy for reorganization under Section 77 (b) of the Bankruptcy Act (47 Stat. 475), it was nevertheless in a position, by reason of the orders of the Court, to carry out the work necessary to construct the vessels. The Secretary of the Navy found the subsidiary to be the lowest satisfactory bidder and awarded the contract to it.

Acting Secretary Roosevelt states that it is desired, in entering into a formal contract, to carry out the intention of the Navy Department in awarding the contract and the intention of the United Shipbuilding and Dry Dock Cor-

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poration in bidding that the plant, technical personnel and financial resources of United Dry Docks, Incorporated, should be available for the work. In order to carry out the intention of the parties, as above indicated, the Navy Department proposes that the two companies be made principals, jointly and severally, to the formal contract for the construction of the vessels.

My opinion is requested as to whether there is any legal objection to the proposed procedure.

A consideration of all the facts in this case leads to the conclusion that the bid upon which the award was made, although formally submitted by the United Shipbuilding and Dry Dock Corporation alone, was in legal and practical effect the joint bid of both companies. The United Shipbuilding and Dry Dock Corporation is wholly owned by the United Dry Docks, Incorporated, and the officers and directors of the two companies consist of the same persons. The contract entered into between the two companies manifests a clear intention on their part to participate in the work and the profits of the contract and to be responsible for its full performance. Under these circumstances, had the two companies submitted separate bids you would have been clearly justified in considering them double bids and rejecting them for that reason. Since the bid was formally submitted by one company only, you may, by a parity of reasoning, properly consider the bid submitted by the United Shipbuilding and Dry Dock Corporation as the joint bid of the two companies, and amend the award accordingly, and if such action is taken, there will, in my opinion, be no legal objection to making both companies jointly and severally parties to the formal contract. The bid involved is the lowest bid submitted, and it appears that you are satisfied as to the responsibility of the two companies. The procedure suggested offers greater security to the Navy Department and clearly appears to be in the best interest of the United States.

The question submitted is answered accordingly.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE NAVY.

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COMPROMISE OF CLAIMS UNDER SECTIONS 3469 AND 3229 OF THE REVISED STATUTES[1]

The Secretary of the Treasury (upon the recommendation of the Solicitor of the Treasury and any District Attorney or special attorney or agent in charge of the claim) is without authority under section 3469 of the Revised Statutes to compromise a final judgment if there is no doubt that the judgment can be collected in full.

The Commissioner of Internal Revenue (with the advice and consent of the Secretary of the Treasury and the Attorney General, the latter in cases in which suit has been commenced), is without authority under section 32_9 of the Revised Statutes to compromise a case if there is no doubt either as to the legality of the claim or as to the collectibility thereof.

The rule is the same as to the compromise of interest and penalties.

DEPARTMENT OF JUSTICE,
October 24, 1933.

SIR: I have the honor to acknowledge the receipt of your letter of July 31, 1933, requesting my opinion with respect to the authority to compromise conferred by Sections 3469 and 3229 of the Revised Statutes. The specific questions presented are as follows:

"1. Has the Secretary of the Treasury (upon the recommendation of the Solicitor of the Treasury and any district attorney or special attorney or agent having charge of the claim) *authority* under Section 3469 of the Revised Statutes to compromise a final judgment if there be no doubt as to the entire collectibility of the judgment?

"2. Has the Commissioner of Internal Revenue (with the advice and consent of the Secretary of the Treasury and the Attorney General, the latter in cases in which suit has been commenced)[2] *authority* under Section 3229 of the Revised Statutes to compromise a case if there be no doubt as to either the legality of the claim of the Government or the collectibility thereof?"

You further request that the authority to compromise interest and penalties be separately considered.

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[1] The publication of this opinion was temporarily withheld.

[2] Attention is invited to Section 5 of Executive Order No. 6166 (June 10, 1933), which transfers to the Attorney General exclusive power to compromise cases where suit has been commenced.

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The statutes to which you refer provide:

"SEC. 3469. Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to *compromise* such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws. [Italics supplied.]

"SEC. 3229. The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may *compromise* any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may *compromise* any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise." [Italics supplied.]

It will be observed that Section 3469 is a general statute, while Section 3229 is special. Being special, Section 3229 is exclusive to the extent that it applies. Both sections confer upon the specified administrative officers, acting jointly, unlimited power to "compromise" the specified cases and claims. Thus the precise question presented with respect to each statute is what is meant by the term "compromise".

Webster's New International Dictionary defines the word "compromise" as meaning—

"A settlement by arbitration or by consent reached by *mutual concessions;* a reciprocal abatement of extreme demands or rights, resulting in an agreement; * * *." [Italics supplied.]

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It is well settled that "mutual concessions" are essential to a valid compromise agreement. *Fire Insurance Association* v. *Wickham*, 141 U. S. 564, 577; *Owensboro Ditcher & Grader Co.* v. *Markham*, 32 F. (2d) 564, 565 (C. C. A. 6th); *Roark* v. *Fordson Coal Co.*, 10 F. (2d) 70, 71 (C. C. A. 6th); *Big Diamond Mills Co.* v. *United States*, 51 F. (2d) 721, 724 (C. C. A. 8th); *Skinner* v. *Cromwell*, 40 F. (2d) 241, 245 (C. C. A. 10th); *United States* v. *Golden*, 34 F. (2d) 367, 374 (C. C. A. 10th).

This was recognized by Solicitor General Richards (approved by Attorney General Griggs), in 23 Op. 18, where he said (p. 20):

"A compromise is an adjustment or settlement by *mutual concessions*. The claim must in some way be doubtful. There must be room for the 'play of give and take'." [Italics supplied.]

Such has been the position taken by all of the Attorneys General passing upon the question (12 Op. 543; 16 Op. 259; 617; 21 Op. 50; 264; 23 Op. 18; 631; 36 Op. 40) except two (17 Op. 213; 29 Op. 217). With those two I am unable to agree.

There is much to be said for the proposition that a liberal rule should exist, but my opinion is that if such a course is to be taken it should be at the instance of Congress. I conclude that where liability has been established by a valid judgment or is certain, and there is no doubt as to the ability of the Government to collect, there is no room for "mutual concessions", and therefore no basis for a "compromise".

A similar answer must be made to your inquiry with respect to the power to compromise interest and penalties.

The several statutes provide that the interest shall be collected as a part of the tax.[1] *Big Diamond Mills Co.* v.

[1] Sec. 274 (j), Revenue Act of 1926 (c. 27, 44 Stat. 9) and Sec. 292, Revenue acts of 1928 (c. 852, 45 Stat. 791) and 1932 (c. 209, 47 Stat. 169) provide for 6 per cent. interest upon deficiencies to be "collected as a part of the tax".

Secs. 274 (k) and 276 (a) and (b), Revenue Act of 1926, and Secs. 296 and 294 (a) and (b), Revenue Acts of 1928 and 1932, provide that if a deficiency is not paid in accordance with the terms of an extension of time, or if the tax is not paid when due, or if a deficiency is not paid in full within 10 days from the date of demand from the Collector, there shall be collected "as a part of the tax" interest at the rate of 1 per centum a month.

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United States, 51 F. (2d) 721, 725 (C. C. A. 8th). See *United States* v. *Childs*, 266 U. S. 304. The two may not be divorced and the interest compromised separately. *Big Diamond Mills Co.* v. *United States*, *supra*, p. 725; *Colorado Milling & Elevator Co.* v. *Howbert*, 57 F. (2d) 769, 772 (C. C. A. 10th). It follows that the tax and the interest constitute one liability which goes to make up a "case" arising under the internal revenue laws within the meaning of Section 3229, Revised Statutes, *supra*, which, when reduced to judgment, constitutes one "claim" within the meaning of Section 3469, Revised Statutes, *supra*. There is nothing in the statute to justify a division of such a "case" or of such a "claim", and precisely the same situation prevails as to the penalties.[2] *Ely & Walker Dry Goods Co.* v. *United States*, 34 F. (2d) 429 (C. C. A. 8th).

With respect to the latter it is worthy of note that by Section 5293, Revised Statutes, Congress conferred upon the Secretary of the Treasury a limited power to remit fines, penalties or forfeitures imposed under authority of any internal revenue law where the amount did not exceed one thousand dollars, provided "it was incurred without willful negligence or fraud". However, that statute was repealed in 1922 (c. 356, Sec. 642, 42 Stat. 858, 989), and Congress has not seen fit to restore such power. Thus it will be seen that Congress has never extended unlimited power to remit or cancel penalties, and the power it did extend it recalled. In the face of this action I cannot conclude that Section 3229 confers unlimited power to remit or forgive a penalty where liability is clear and there is no doubt as to the ability of the Government to collect.

[2] Sec. 275 (a), Revenue Act of 1926, and Sec. 293, Revenue Acts of 1928 and 1932 impose a 5 per cent. penalty upon deficiencies due to negligence or intentional disregard of rules and regulations where no fraud is involved, and provide that such penalty "shall be assessed, collected, and paid in the same manner as if it were a deficiency".

Sec. 3176, Revised Statutes, as amended by Sec. 1103, Revenue Act of 1926, and Sec. 291, Revenue Acts of 1928 and 1932 impose a 25 per cent. penalty for willful failure to make and file a return as required by law, and provide that such penalty shall be added "to the tax".

Sec. 3176, Revised Statutes, as amended by Sec. 1103, Revenue Act of 1926, Sec. 275 of the 1926 Act, and Sec. 293 (b), Revenue Acts of 1928 and 1932 provide that in case a false or fraudulent return or list is willfully made, or if any deficiency is due to fraud with intent to evade tax, the Commissioner shall add to the tax 50 per cent. of its amount.

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These conclusions make it unnecessary for me to consider the several situations to which you specifically refer.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

COMPROMISE OF CLAIMS UNDER SECTIONS 3469 AND 3229 OF THE REVISED STATUTES—POWER OF THE ATTORNEY GENERAL IN MATTERS OF COMPROMISE

The opinion of the Attorney General to the Secretary of the Treasury dated October 24, 1933, relating to the power to compromise conferred by sections 3469 and 3229 of the Revised Statutes, is not to be construed as precluding the compromise of cases in which there is uncertainty as to liability or collection; nor is that opinion to be understood as involving or restricting the authority and discretion of the Attorney General in matters of compromise.

In cases referred to the Departmnet of Justice, whatever powers of compromise were conferred by the above-mentioned sections are now vested in the Attorney General by virtue of section 5 of Executive Order No. 6166 of June 10, 1933.

The Attorney General has plenary power to compromise cases referred to the Department of Justice. This power is in part inherent, appertaining to the office, and in part derived from various statutes and decisions.

DEPARTMENT OF JUSTICE,
October 2, 1934.

SIR: In connection with my opinion of October 24, 1933 (38 Op. 94), dealing with the power to compromise conferred by Sections 3469 and 3229 of the Revised Statutes, I have given careful consideration to the class or group of cases outlined in your letter to me of January 30, 1934.

The conclusion reached in the opinion is that "where liability has been established by a valid judgment or is certain, and there is no doubt as to the ability of the Government to collect, there is no room for 'mutual concessions', and therefore, no basis for a 'compromise'". The word "certain" relates, of course, to claims which are liquidated or undisputed. Where there is a bona fide dispute as to either a question of fact or of law, certainty cannot be said to exist. In such cases there is room for mutual concession. The adequacy of the concession or consideration sufficient to justify the acceptance of an offer of compromise

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is to be determined by the exercise of sound discretion. The opinion, therefore, should not be so construed as to preclude compromise settlement of such cases.

There appears to be no statutory authority to compromise *solely* upon the ground that a hard case is presented, which excites sympathy or is merely appealing from the standpoint of equity, but the power to compromise clearly authorizes the settlement of any case about which uncertainty exists as to liability or collection. Thus interpreted the opinion of October 24, 1933, will, I believe, enable you to determine whether the cases summarized in your letter of January 30, 1934, fall within or without its purview.

It should, also, be observed that the questions specifically considered in that opinion related only to the power to compromise conferred by Section 3469 of the Revised Statutes upon the Secretary of the Treasury and by Section 3229 upon the Commissioner of Internal Revenue. In cases referred to the Department of Justice, whatever powers were conferred by these Sections, whether general or special, broad or narrow, are now vested in the Attorney General by virtue of Section 5 of Executive Order No. 6166, of June 10, 1933. At the same time it should be observed that in no event was his prior and plenary power thereby curtailed.

This power is in part inherent, appertaining to the office, and in part derived from various statutes and decisions which need not be quoted at length, but I may point out that while their opinions have not always been harmonious, its exercise has long been asserted by my predecessors and upheld by judicial authority. Concerning it, Attorney General Taney said (2 Op. 486):

"An attorney conducting a suit for a party has, in the absence of that party, a right to discontinue it whenever, in his judgment, the interest of his client requires it to be done. If he abuses this power, he is liable to the client whom he injures. * * * An attorney of the United States, except insofar as his powers may be restrained by particular acts of Congress, has the same authority and control over the suits which he is conducting. The public interest and the principles of justice require that he should have this power; for, why should the public be put to the

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expense of preparing a suit for trial, and procuring evidence, when the attorney knows that, on principles of law. it cannot be supported? Why should he be required, on behalf of the United States, to harass a defendant with a prosecution, which, pending the suit, he discovers to be unjust and groundless?"

Attorney General Griggs in an opinion (22 Op. 491 494) distinguishing between the power of the Attorney General and that of the Secretary of the Treasury, as I now do, said:

"Nevertheless, it is advisable to add, under the circumstances, that the primary, broad, and general control by the Attorney General of suits in which the United States is interested, conferred by the statutes and established by decisions of the Supreme Court, of which the Confiscation Cases (7 Wall., 454), may be mentioned, fully authorizes such disposition of pending litigation of the Government. including the class of cases which embraces the one before us, as seems to him meet and proper. He exercises superintendence and direction over the United States attorneys and general supervision over proceedings instituted for the benefit of the United States, and to him is necessarily intrusted, in the exercise of his sound professional discretion and because of the nature of the subject, the determination of many questions of expediency and propriety affecting the continuance or dismissal of legal proceedings. (2 Op. 482, 486.) He may absolutely dismiss or discontinue suits in which the Government is interested; *a fortiori* he may terminate the same upon terms, at any stage, by way of compromise or settlement."

In 23 Op. 507, Acting Attorney General Beck made the same observation; and in the case of *New York* v. *New Jersey*, 256 U. S. 296, the Supreme Court held that in view of the authority of the Attorney General to control and conduct litigation in which the United States is interested, it was within his authority to agree that the United States would retire from the case on the terms stated in the stipulation. Probably the leading cases on the subject are the *Confiscation Cases*, 74 U. S. 454 (1868); and *United States* v. *San Jacinto Tin Company*, 125 U. S. 273.

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284 (1888), but also equally emphatic on the power of the Attorney General are *United States* v. *Throckmorton*, 98 U. S. 61 (1878); *In re Neagle*, 135 U. S. 1, 67 (1890); *New York* v. *New Jersey*, 256 U. S. 296 (1921); *Kern River Company* v. *United States*, 257 U. S. 147 (1921); and *Ponzi* v. *Fessenden*, 258 U. S. 254 (1921).

In the San Jacinto case the Court said:

"We are not insensible to the enormous power and its capacity for evil thus reposed in that department of the Government (Department of Justice). * * * But it has often been said that the fact that the exercise of power may be abused is no sufficient reason for denying its existence" * * * [Interpolation supplied].

See also *Swift & Co.* v. *United States*, 276 U. S. 311.

There are also many decisions of the lower courts dealing with the same subject, chief among which are *United States* v. *Schumann*, Fed. Case No. 16, 235 (1866); *Conner* v. *Cornell*, 32 F. (2d) 581 (C. C. A. 8th) (1929); *Mars* v. *McDougal*, 40 F. (2d) 247 (C. C. A. 10th) (1930); *Sutherland* v. *International Insurance Co. of New York*, 43 F. (2d) 969 (C. C. A. 2d) (1930); and in *People* v. *Finch Pruyn & Co.*, 202 N. Y. S. 582, (affirmed 238 N. Y. 584) it was held that the Attorney General of the State of New York, under the common law, could compromise a case in which the State of New York was interested. "And although it has been said that there is no common law of the United States, it is still quite true that when acts of Congress use words which are familiar in the law of England they are supposed to be used with reference to their meaning in that law." *San Jacinto Case*, *supra*. See also the *Attorney General* v. *The Town of Farnham* in Surrey, Hardres 504 (1679); *Rex* v. *Wilkes*, Burrows 2527, 2554, 2570 (1770); *Reg.* v. *Allen*, 5 L. T. R. 636 (1862); *The King* v. *Austen*, 9 Price 142. Further confirmation may be found in the well established rule that a power vested in a government officer carries with it necessarily authority to make that power effective, *McGrain* v. *Daugherty*, 273 U. S. 135, 173; *In re Neagle*, 39 Fed. 833, 851; *State* v. *Hildebrant*, 93 Ohio State 1; 34 Op. 320, 326; Opinion of May 22, 1934 (37 Op. 534), to the Secretary of War.

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His statutory authority begins with the Judiciary Act of September 24, 1789 (c. 20, Sec. 35, 1 Stat. 92), includes the Act of June 22, 1870, c. 150, 16 Stat. 162, formally creating the Department of Justice, and is extended by the recent Economy Act of March 3, 1933 (c. 212, 47 Stat. 1489), as amended, by the Act of March 20, 1933, c. 3, 48 Stat. 8, further including, of course, the powers conferred by Sections 3469 and 3229, Revised Statutes, and transferred to him by Executive order.

Speaking of certain of his statutory powers, the Court of Claims in *Perry* v. *United States*, 28 C. Cls. 483, 491 (1893), said:

"These provisions are too comprehensive and too specific to leave any doubt that Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney General, all the litigation and *all the law business* in which the United States are interested, * * *." [Italics supplied.]

At the same time, I have no hesitation in declaring that it is a power, whether attaching to the office or conferred by statute or Executive order, to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice, carrying with it both civil and criminal features, if both exist, and any other matter germane to the case which the Attorney General may find it necessary or proper to consider before he invokes the aid of the courts; nor does it end with the entry of judgment, but embraces execution (*United States* v. *Morris*, 10 Wheat. 246).

It follows, therefore, that the authority and discretion of the Attorney General are not to be understood as involved in or restricted by the opinion of October 24, 1933, to which this letter should be regarded as supplemental.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

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APPLICABILITY OF DEFINITIONS OF RELATIONSHIP AND DEPENDENCY CONTAINED IN THE WORLD WAR VETERANS' ACT

The definitions of relationship and dependency contained in the World War Veterans' Act, 1924, as amended, are applicable in awarding compensation to or for dependents of World War veterans or in apportioning compensation payable to veterans under sections 27 and 28, Title III, Public No. 141, Seventy-third Congress.

DEPARTMENT OF JUSTICE,
October 10, 1934.

SIR: I have your letter of September 8, 1934, in which you request my opinion upon a question of interpretation arising under Section 28, Title III of the Independent Offices Appropriation Act, fiscal year 1935 [Public No. 141, 73d Congress, 48 Stat. 524], hereinafter indicated.

It appears from your submission that the effect of the Act approved March 20, 1933 (48 Stat. 8; Public No. 2, 73d Congress), hereinafter referred to as Public No. 2, was to repeal all public laws granting compensation or pension to veterans of the Spanish American War, including the Boxer Rebellion, the Philippine Insurrection, and the World War, and to substitute therefor a pension to be paid to certain classes of persons enumerated in the Act under regulations to be issued by the President. Existing awards of compensation and pension under the laws in effect March 20, 1933, being paid to disabled veterans or the dependents of veterans who died as a result of disease or injury directly connected with active military or naval service were protected except as to rates, time of entry into active service, and special statutory allowances. No benefits were paid for temporary disability or for presumptive service connection under Public No. 2, and dependents were entitled to benefits on a basis of permanent ratings only in those cases where veterans entered hospitals and in death cases.

By virtue of the authority contained in this Act, the President promulgated regulations under which the terms "widow", "child", "mother", or "father" were defined. The effect of these regulations was to deny benefits under Public No. 2 to certain classes of persons who had theretofore been considered as dependents in World War cases.

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Under Section 27 of Public No. 141, 73d Congress, presumptive service connected cases established on March 19, 1933, in accordance with Section 200 of the World War Veterans Act, 1924, as amended, which were severed by Public No. 2, or denied after review under Public No. 78, 73d Congress (Sec. 20, 48 Stat. 283), were reestablished (subject to the exceptions contained therein), and as to such cases the provisions of the first paragraph of Section 200 of the World War Veterans Act, 1924, as amended, were reenacted.

Under the second proviso of Section 28 (48 Stat. 524), new cases were provided for in the following language:

"* * * *Provided further*, That, subject to the limitations above prescribed, except as to receipt of compensation on March 19, 1933, and notwithstanding the provisions of Public Law Numbered 2, Seventy-third Congress, or any other law, veterans whose disease, injury, or disability is established on or after this paragraph as amended takes effect as service-connected in accordance with the provisions of section 200 of the World War Veterans' Act, 1924, as amended, shall be entitled to receive compensation in accordance *with the provisions of such Act, as amended, and the rating schedule* in effect on March 19, 1933; * * *." [Italics supplied.]

Section 200 of the World War Veterans Act, 1924, as amended, provides for the payment of compensation and the establishment of service connection. The rates payable under Section 200 are set forth in Title II of the Act (secs. 201–202), which authorizes the payment of additional compensation for a wife, child or children, and/or dependent mother or father, or both, in those cases in which disability is rated temporary. The definitions of relationship and dependency contained in Section 3, Title I of the Act, include "stepchildren", "illegitimate children", "step-parents", and "persons in *loco parentis*" (43 Stat. 607).

You state that you are in doubt as to whether the Congress in enacting Public No. 141, 73d Congress, intended to extend the benefits granted therein to those persons who may not be considered as dependents under the regulations issued under Public No. 2, in effect since March 20, 1933, and request my opinion upon the following question:

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"Whether in awarding compensation to or for dependents of World War veterans, or in apportioning compensation payable to veterans, under Sections 27 and 28, Title III, Public No. 141, 73d Congress, the definitions of relationship and dependency contained in the World War Veterans Act, 1924, as amended, are applicable, rather than those contained in the regulations under Public No. 2, 73d Congress."

I understand that your question relates to the new cases provided for in the second proviso of Section 28, above quoted, and those cases reinstated under Section 27 in which new dependents are involved, and that the precise question is whether or not that part of Title II of the World War Veterans Act, 1924, as amended (secs. 201–202), which provides the rates of compensation payable under Section 200 of that Act, is revived and, if so, whether the definitions of relationship and dependency set forth in Section 3, Title I, of the Act are likewise revived.

The words "such act", as used in the language "shall be entitled to receive compensation in accordance with the provisions of such act, as amended", refer to the World War Veterans Act, 1924, as amended, and the quoted language clearly indicates an intention to revive as much of the World War Veterans Act, 1924, as amended, as is necessary to determine the rates payable thereunder.

It is a well known rule that the interpretative section of an act applies to the entire act and that definitions contained therein must be followed in effectuating its purposes. Since the definitions contained in the World War Veterans Act, 1924, are a part of "such act", it must be concluded that they are also revived. I, therefore, concur in your Solicitor's opinion that such definitions are applicable to cases under Public No. 141, where the disability compensation involves additional amounts or apportionments for dependents.

This conclusion is in harmony with the Act of June 28, 1934 (Public No. 484, 73d Congress, 48 Stat. 1281), which authorizes the payment of death compensation to the widows and children of World War Veterans who die or have died from nonservice connected disabilities wherein the term "child" as defined in the World War Veterans Act is applicable in determining questions of relationship and de-

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pendency. Furthermore it has the effect of making the definitions of the World War Veterans Act uniformly applicable to all World War Veterans cases in which such questions are involved.

In view of the foregoing, it is my opinion that in awarding compensation to or for dependents of World War Veterans or in apportioning compensation payable to veterans under Sections 27 and 28, Title III, Public No. 141, 73d Congress, the definitions of relationship and dependency contained in the World War Veterans Act, as amended, are applicable.

Respectfully,

HOMER CUMMINGS.

To the ADMINISTRATOR OF THE VETERANS' ADMINISTRATION.

AUTHORITY OF THE SECRETARY OF AGRICULTURE TO PURCHASE AND DISTRIBUTE SURPLUS SUGAR FOR RELIEF PURPOSES

The Secretary of Agriculture is authorized to purchase surplus sugar within the areas designated in section 15 (f) of the Agricultural Adjustment Act, as amended, with funds set apart for such use, and to distribute it for relief purposes in continental United States, without charging it against the quotas of such areas.

DEPARTMENT OF JUSTICE,
October 16, 1934.

SIR: I have your letter of September 15, which reads in part as follows:

"We have under consideration the question of whether under Section 15 (f) of the Agricultural Adjustment Act as amended by Section 8 of the Sugar Act (Public—No. 213—73rd Congress) the Secretary of Agriculture is authorized to purchase surpluses of sugar in the several areas to which Section 15 (f) is made applicable and import the sugar into the United States for distribution through relief agencies to persons otherwise unable to purchase sugar, without charging it against the quotas for such areas.

"I feel it of high importance that the removal of these surpluses of sugar which the market will not absorb should not lead to the destruction of a commodity which those on

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relief rolls in our country are wanting. Unless, therefore, I am compelled by the terms of the Act to provide for surplus removal by destruction, I am intent upon diverting part of these surpluses into relief channels. Your opinion on this problem is, therefore, requested for the guidance of this Department."

The Act of May 9, 1934 (48 Stat. 670), included sugar beets and sugarcane as basic agricultural commodities under the Agricultural Adjustment Act (48 Stat. 31) and added to the latter statute the following provisions:

SEC. 8a. "(1) Having due regard to the welfare of domestic producers and to the protection of domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations—

"(A) (i) Forbid processors, handlers of sugar, and others from importing sugar into continental United States for consumption, or which shall be consumed, therein, and/or from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in any area to which the provisions of this title with respect to sugar beets and sugarcane may be made applicable, for consumption in continental United States, sugar from the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, the island of Guam, and from foreign countries, including Cuba, respectively, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year * * *.

"(ii) Forbid processors, handlers of sugar, and others from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in the Territory of Hawaii or Puerto Rico for consumption in continental United States, sugar from the Territory of Hawaii or Puerto Rico, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year * * *.

"(B) Forbid processors, handlers of sugar, and others from marketing in, or in the current of, or in competition with, or so as to burden, obstruct, or in any way affect,

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interstate or foreign commerce, sugar manufactured from sugar beets and/or sugarcane, produced in the continental United States beet-sugar-producing area, the States of Louisiana and Florida, and any other State or States in excess of the following quotas * * *." (48 Stat. 672, 673.)

SEC. 15. (f) "The President, in his discretion, is authorized by proclamation to decree that all or part of the taxes collected from the processing of sugar beets or sugarcane in Puerto Rico, the Territory of Hawaii, the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam (if the provisions of this title are made applicable thereto), and/or upon the processing in continental United States of sugar produced in, or coming from, said areas, shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund, in the name of the respective area to which related, to be used and expended for the benefit of agriculture and/or paid as rental or benefit payments in connection with the reduction in the acreage, or reduction in the production for market, or both, of sugar beets and/or sugarcane, and/or used and expended for expansion of markets and for removal of surplus agricultural products in such areas, respectively, as the Secretary of Agriculture, with the approval of the President, shall direct." (48 Stat. 675.)

SEC. 16 (d) "The Secretary of Agriculture is authorized to purchase, out of such proceeds of taxes as are available therefor, during the period this Act is in effect with respect to sugar beets and sugarcane, not in excess of three hundred thousand tons of sugar raw value from the surplus stocks of direct-consumption sugar produced in the United States beet-sugar area, at a price not in excess of the market price for direct consumption sugar on the date of purchase, and to dispose of such sugar by sale or otherwise, including distribution to any organization for the relief of the unemployed, under such conditions and at such times as will tend to effectuate the declared policy of section 8a of this Act. The sugar so purchased shall not be included in the quota for the United States beet-sugar area. All proceeds received by the Secretary of Agriculture, in the exercise of the pow-

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ers granted hereby, are appropriated to be available to the Secretary of Agriculture for the purposes described in subsections (a) and (b) of section 12 of this Act." (48 Stat. 678.)

Specific quotas are provided for "the continental United States beet-sugar-producing area" and for the states of Louisiana and Florida. With these exceptions the quotas are to be determined by the Secretary of Agriculture according to stated formulas. In determining the quotas an estimate is first made of "the consumption requirements of sugar for continental United States for the calendar year." From the figure representing such requirements the quotas for the continental beet sugar area and for the states of Louisiana and Florida are first deducted and the remainder is apportioned among other sugar producing areas, including the territories, possessions and foreign countries, on the basis of average quantities therefrom brought into continental United States in previous representative periods, observing certain stated minimums. The estimated consumption requirements and the quotas based thereon are adjustable from time to time in order to meet actual requirements of consumers; and it is provided that the amount of surplus stocks of sugar produced in a given area may be deducted in the next succeeding year "from the quotas for production, importing, receiving, and/or marketing, and/or from the allotments thereof", for the affected area.

Section 12 (b) of the Agricultural Adjustment Act had authorized the use of the proceeds of taxes imposed under Title I of that statute for the "removal of surplus agricultural products", and your Solicitor states, in the opinion which accompanied your letter, that under "established administrative interpretation" such removal of surpluses was accomplished, in part at least, by purchase and distribution for relief purposes. That Congress knew of the interpretation thus placed upon its language, when a year later it employed the same words in the above quoted amendment, is a reasonable presumption; that it did, in fact, recognize such method of removing surpluses as a proper one is established beyond doubt by Section 16 (d), *supra*.

However, the express provision in Section 16 (d) for the purchase and distribution of not exceeding three hundred

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thousand tons of beet sugar surplus may be read as implying a negation that other and general provisions authorize such purchase and distribution. Also, it provided that the sugar purchased and distributed under Section 16 (d) shall not be included within the quota for the beet sugar area, which carries the implication that without such express authority such sugar would be included within the quota. Your Solicitor has concluded that, whatever may be the effect of Section 16 (d), its application is confined to purchases within continental United States; and this is undoubtedly true with respect to its direct application, as distinguished from its possible implications.

Section 16 (d) was not included in the bill as originally drafted and as debated at length in both the House and the Senate. It was offered as an amendment by Senator Costigan, near the close of the debate, and was adopted without discussion or explanation save a statement by Senator Harrison that the amendment "meets with the approval of the Secretary of Agriculture" and that "it is to deal with the surplus sugar stock on hand now." 78 Cong. Rec. 6935. Some further light, however, is derived from the fact that throughout the preceding discussions in both branches of Congress there had been frequent objections that the quota of 1,450,000 tons originally proposed, and the quota of 1,550,000 tons finally adopted, for the continental beet sugar area failed to meet the exigencies by 300,000 tons and 200,000 tons, respectively. (78 Cong. Rec. 6026, 6038, 6042, 6810, 6920.) Congressman Woodruff stated (78 Cong. Rec. 6042, 6656):

"Last year we produced the equivalent of over 1,750,000 short tons of refined beet sugar reduced to raw sugar value as defined in this bill. Yet, we are reduced in this bill to 1,550,000 short tons, raw value. * * * Now, what are we to do with the 200,000 tons of sugar already produced, which we may not market?"

There is no doubt that the amendment, sponsored by members from the beet sugar area, was proposed and accepted in consequence of the objections and problems thus insistently advanced, but certainly there is in this no indication of an intention that it should limit or negative discre-

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tionary powers conferred upon the Secretary of Agriculture by other sections with respect to quotas for and surpluses in the territories and possessions. Furthermore, to accept the contrary view would require the conclusion that the statute, which dealt primarily with sugar beets and sugar cane and specifically provided for segregating the taxes thereon in the territories and possessions for use, among other things, in removing agricultural surpluses therein, nevertheless by mere implication in another part inhibited, or at least imposed broad restrictions upon, the removal of *sugar* surpluses, as distinguished from other agricultural surpluses, in such areas.

It must, therefore, be concluded that the Secretary is authorized to remove surplus sugar in the territories and possessions through purchase and distribution for relief, in his discretion and within the limits of the funds made available therefor. There is no express limitation as to where the distribution shall be made, and certainly there is no occasion for implying a limitation that the sugar shall be distributed in the area in which produced, where it is quite conceivable there may be no need for it.

You also inquire whether or not the sugar, when brought into continental United States, must be charged against the quota for the area in which produced. Upon this, it has been stated by representatives of your Department, and is also suggested in the opinion of your Solicitor, that the sugar would be distributed to needy persons whose requirements in this respect have not been, and could not be, taken into consideration when determining the statutory "consumption requirements" and the quotas based thereon. Accepting it as a fact that the wants of these persons would not be supplied except for the proposed federal distribution, the suggested conclusion necessarily follows, for there is no possibility under the statute of including in the "consumption requirements" and in the quotas an amount of sugar which would not be handled commercially and which would be neither used nor available for use save upon the contingency of its being purchased as surplus by the United States in a particular area and distributed for relief. This is demonstrable when it is considered that every ton included

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in the consumption requirements reflects an increase in the quotas of many areas, with no provision for increasing the quota of a particular area alone.

Furthermore, to charge this sugar against the quotas would have the effect in continental United States of reducing permitted importations and shipments below actual commercial needs, and in the territory in which the purchase was made literally nothing would have been accomplished. To illustrate, if Puerto Rico has a surplus of a thousand tons and you buy that surplus, but in doing so reduce by a corresponding amount the number of tons which may be shipped from Puerto Rico into continental United States, you thereby create in Puerto Rico another surplus in the same amount. It is evident, therefore, that sugar purchased to remove a surplus and brought into continental United States for distribution to persons who otherwise would not be supplied and whose needs are not represented in the estimated consumption requirements and quotas, cannot be charged against the quotas.

Without going into the question of the application of the quota provisions generally to property of the United States, and assuming *argueado* that Congress did not contemplate the bringing in of sugar beyond quota limits, nevertheless the indulging of such a presumption in the present circumstances would defeat a clear power of the Secretary under the same Act. In such a situation the presumption must yield to the firmly established principle that a statute must not be so construed that one part will forbid the doing of that which another authorizes. *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 325–326, and cases there cited.

Considering the foregoing, it is my opinion that you are authorized to purchase surplus sugar within the areas designated in Section 15 (f) of the Agricultural Adjustment Act, as amended, with funds duly set apart for such use, and to distribute it for relief purposes in continental United States, without charging it against the quotas for such areas.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF AGRICUTURE.

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APPLICABILITY OF THE PROVISO IN THE BUREAU OF INTERNAL REVENUE APPROPRIATION MADE BY THE EMERGENCY APPROPRIATION ACT, FISCAL YEAR 1935

The proviso contained in the Emergency Appropriation Act, fiscal year, 1935, under the heading "Bureau of Internal Revenue" does not affect employees who were not actually separated from service in the Bureau of Prohibition or the Alcoholic Beverage Unit, Department of Justice, between June 10 and December 31, 1933, and who were transferred to the Treasury Department by Executive Order No. 6639 of March 10, 1934.

The said proviso applies to employees who were reinstated to their positions by the Treasury Department upon the basis of a classified civil-service status and requires such employees to take new, open competitive examinations.

DEPARTMENT OF JUSTICE,
October 25, 1934.

SIR: I refer to your letter of September 18, 1934, relative to the opinion of the Attorney General to the President dated September 6, 1934 (38 Op. 51), answering certain questions raised by the Civil Service Commission in connection with its administration of the following proviso contained in the Emergency Appropriation Act, fiscal year 1935 (Public No. 412, 73d Congress), under the heading "Bureau of Internal Revenue":

"*Provided*, That after December 1, 1934, no part of the appropriation made herein or heretofore made for the fiscal year 1935 shall be used to pay the salary of any person formerly employed as investigator, special agent, senior warehouseman, deputy prohibition administrator, agent, assistant attorney, assistant prohibition administrator, senior investigator, deputy production administrator, storekeeper or gauger, or any other position in the Prohibition Bureau or Alcoholic Beverage Unit, Department of Justice, who was separated from the service of such Bureau or Unit between June 10, 1933, and December 31, 1933, while in any such position in the Treasury Department, unless and until such person shall be appointed thereto as a result of an open competitive examination to be hereafter held by the Civil Service Commission." (48 Stat. 1021, 1061.)

Your letter and enclosures raise two questions which were not considered in the opinion of September 6, 1934. The

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first question is whether the employees transferred from the Department of Justice to the Treasury Department by Executive Order No. 6639 of March 10, 1934, which was submitted to the Congress under the Reorganization Statute (Sec. 16, Act of March 3, 1933, c. 212, 47 Stat. 1489, 1517), and became in effect an act of Congress on May 10, 1934 (48 Stat. 680), are affected by the proviso above set out.

By its terms, the proviso applies only to persons who were employed in the Bureau of Prohibition and the Alcoholic Beverage Unit and who were "separated" from the service thereof between June 10 and December 31, 1933.

Under the provisions of Executive Order No. 6166 of June 10, 1933, which became effective August 10, 1933, some of the personnel of the Bureau of Prohibition were actually separated from the service at the close of business on August 9, 1933. Many of these so separated were subsequently reinstated to positions in the Treasury Department under Civil Service Rule IX, and their status is considered in the opinion of September 6, 1934. The remaining employees of the Bureau of Prohibition were retained in the Department of Justice, and many of them were subsequently transferred to the Treasury Department by Executive Order No. 6639 of March 10, 1934.

Unlike the service of those separated and reinstated to positions in the Treasury Department, the service of the employees retained in the Department of Justice was uninterrupted and they continued to perform the same kind of work. In fact, their names were never removed from the payrolls of the Department of Justice and their retention was approved by the President prior to the effective date of the order. Actually, therefore, they were never separated from the service, but were merely transferred from one unit of the Department of Justice to another.

No reference is made in the proviso to Executive Order No. 6639 of March 10, 1934, and there is nothing in the proviso to indicate that the word "separated" is used therein to denote anything other than an actual separation.

In view of the foregoing, it is my opinion that employees who were not actually separated from service in the Bureau of Prohibition or the Alcoholic Beverage Unit between

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June 10 and December 31, 1933, and who were transferred to the Treasury Department by Executive Order No. 6639 of March 10, 1934, are not affected by the proviso.

There is a further reason which supports this conclusion. The Executive order in question transferred to the Treasury Department certain functions of the Alcoholic Beverage Unit of this Department, together with the personnel engaged in the performance of the work transferred. Paragraph 3 (c) thereof provided that the officers and employees transferred to the Treasury Department under the terms of the order who did not already possess a competitive classified civil service status should not acquire such status by reason of such transfer except upon recommendation by the Secretary of the Treasury to the Civil Service Commission, subject to such non-competitive tests of fitness as the Commission might prescribe; and that no officer or employee so transferred might be retained in the Treasury Department without appropriate civil service status for a period longer than sixty days from the effective date of the order.

I am informed that 977 employees were transferred to the Treasury Department by Executive Order No. 6639. Of these 797 possessed a civil service status acquired through open competitive examination. The remaining 180 had no civil service status. 158 of the 180 were appointed subsequent to August 10, 1933, and therefore are not in any event affected by the proviso. If it be held that the proviso applies to those employees who were transferred from the Bureau of Prohibition to the Division of Investigation at the close of business on August 9, 1933, the result will be that the 797 employees who possessed a competitive classified civil service status at the time of their transfer to the Treasury Department on May 10, 1934, and 22 who did not possess such a status will be required to take new, open competitive examinations merely because they were theoretically separated from the Bureau of Prohibition on August 9, 1933, although actually transferred to the Division of Investigation of the Department of Justice; whereas 158 persons who were appointed in the Division of Investigation and the Alcoholic Beverage Unit subsequent to August 10, 1933, without regard to the Civil Service Act and Rules, and who

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possessed no competitive classified civil service status at the time of their transfer to the Treasury Department on May 10, 1934, will be permitted to retain their positions in the Treasury Department upon passing a non-competitive examination. Thus, if the proviso be held to include the 819 employees in question, then it must be said that the Congress accepted the principle of open competitive examination as to those employees, while at the same time it rejected it as to the 158 employees appointed subsequent to August 10, 1933. Such a view clearly leads to an absurd result, and it is unreasonable to presume that such result was in the contemplation of the Congress when the proviso was enacted.

The second question raised by your letter is whether the proviso in question includes employees who have already taken and passed a competitive civil service examination. A brief summary of the history of the Bureau of Prohibition is necessary to a proper consideration of this question.

Prior to March 3, 1927, there was in the Bureau of Internal Revenue a unit known as the Prohibition Unit in which certain field positions were not required to be filled in accordance with the Civil Service Act and Rules. The Act of March 3, 1937, c. 348, 44 Stat. 1381, established this unit as a separate bureau in the Treasury Department known as the Bureau of Prohibition and directed that the employees of the field service of the said Bureau who had not acquired a proper civil service status should have their employments terminated six months from the effective date of the act, which was April 1, 1927. There were 2,182 such field positions. Competitive examinations were duly held by the Civil Service Commission. There were 15,524 applicants for the first examination, of whom 12,436 took the written test. However, only 4,504 of these passed the examination. Character investigations of these persons further reduced to 2,639 the total number of eligibles for the positions of agent, inspector, and investigator. I am informed that as a result of the examinations held by the Commission pursuant to the act of March 3, 1927, seventy-five percent of the employees affected by that act became ineligible to hold their positions.

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The Act of May 27, 1930, c. 342, 46 Stat. 427, transferred the Bureau of Prohibition to the Department of Justice without change in the classified status of the employees, except that attorney positions were withdrawn from the competitive classified service. Executive Order No. 6166 of June 10, 1933, transferred the investigative work connected with prohibition enforcement to the Division of Investigation of the Department of Justice. Thereafter this work was consolidated in a unit of the Division of Investigation known as the Alcoholic Beverage Unit, and the positions in the unit were excepted from the classified service.

It thus appears that when the Bureau of Prohibition was abolished by Executive Order No. 6166 as of August 10, 1933, all of the employees of the Bureau had been appointed thereto on the basis of a classified civil service status, except attorneys appointed subsequent to the transfer of the Bureau to this Department. It also appears that all appointments made in the Division of Investigation and the Alcoholic Beverage Unit subsequent to August 10, 1933, were made without regard to the Civil Service Act and Rules.

It appears, however, from the hearings held by the Senate Civil Service Committee on S. J. Res. 113, the predecessor of the proviso under consideration, that the Committee was under the impression that the persons who had been actually separated from the Bureau of Prohibition and the Alcoholic Beverage Unit between June 10 and December 31, 1933, had never taken a real civil service examination. In view of this fact, and also since the Congress could not have intended to require employees who had been reinstated to their positions on the basis of a civil service status acquired through open competitive examination to pass another such examination, it may be assumed that the real purpose of the Congress in enacting the proviso was to require those who had been reinstated to their present positions on a basis other than a civil service status acquired through open competitive examination to pass such an examination. However, the Treasury Department was authorized under Civil Service Rule IX to reinstate, and it did reinstate, only those who possessed a classified civil service status. The

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conclusion is inevitable, therefore, that the proviso requires the persons so reinstated to take new, open competitive examinations. Otherwise, there would be no employees to whom the proviso could apply.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

APPLICABILITY OF SECTION 208 OF THE NATIONAL INDUSTRIAL RECOVERY ACT WITH RESPECT TO PROVIDING SUBSISTENCE HOMESTEADS FOR INDIANS

The principle, stated in opinion of September 10, 1934, that section 208 of the National Industrial Recovery Act does not contemplate collective or communal ownership, but actual purchase by those who occupy the land and the houses erected thereon, is applicable to homesteads provided for Indians beyond the limits of an Indian reservation, but is inapplicable with respect to homesteads provided for Indians within an existing Indian reservation or added to an existing one under the act of June 18, 1934, and subject to its provisions.

DEPARTMENT OF JUSTICE,
October 31, 1934.

SIR: I have the honor to comply with your request of October 18 for my opinion upon a question arising under Section 208 of the National Industrial Recovery Act with respect to providing subsistence homesteads for Indians.

Section 208 reads as follows:

"To provide for aiding the redistribution of the overbalance of population in industrial centers $25,000,000 is hereby made available to the President, to be used by him through such agencies as he may establish and under such regulations as he may make, for making loans for and otherwise aiding in the purchase of subsistence homesteads. The moneys collected as repayment of said loans shall constitute a revolving fund to be administered as directed by the President for the purposes of this section." (48 Stat. 205.)

You also direct my attention to the Act of June 18, 1934 (48 Stat. 984), with reference to Indian land holdings, etc., and inquire whether, in view thereof and in view of the fact that Indians have been accustomed to collective ownership of property, you may consider as inapplicable to homesteads

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provided for them the principle thus stated in my opinion of September 10, 1934:

"In my opinion to you of October 4, 1933, concerning alternative plans for temporarily retaining title in the United States or in a non-profit corporation, I stated: 'It should be borne in mind that the statute necessarily contemplates that the persons who occupy the land and the houses erected thereon will actually purchase them. No particular form of contract is prescribed, but it is rather difficult to conceive of one which would come within the spirit of the statute and yet not bind the settlers as purchasers, or intended purchasers, of the premises occupied.'

"In my opinion, a contract of lease does not amount to a purchase, within the meaning of the provision authorizing 'loans for * * * the purchase of subsistence homesteads,' and ownership by the lessor (the association) would not be ownership by the lessee (the tenant); nor do I think that a collective or communal ownership was intended by Congress." (38 Op. 58.)

The appropriation made in Section 208 of the National Industrial Recovery Act is limited to uses within the stated purpose of "aiding in the redistribution of the overbalance of population in industrial centers." The section is not properly to be interpreted as authorizing discrimination either in favor of or against persons of the Indian race. An Indian who comes within the designated class of beneficiaries may be aided in purchasing a homestead in the same manner as other persons. The fact that one may have been accustomed to collective or communal property holding supplies no reason for reading into the section an exception in his favor.

As to Indians, however, subsequent legislation is to be considered. The Act of June 18, 1934, provides, generally, that hereafter no land of any Indian reservation shall be allotted in severalty; that restrictions upon alienation of Indian lands are continued indefinitely; that the Secretary of the Interior may restore to tribal ownership remaining surplus lands of any Indian reservation; that he may proclaim new Indian reservations on lands acquired pursuant to the Act or add such lands to existing reservations; that lands so acquired shall be held in the name of the United States, in

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trust for the Indian or Indians, with exemption from state taxation, etc. Some provisions are made inapplicable to particular tribes, and the application of the statute is further limited by the following sections:

"SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter." [48 Stat. 986.]

"SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice." [48 Stat. 988.]

It is thus expressly provided that the Act shall not apply to a homestead acquired by an individual Indian upon the public domain beyond the boundary of his reservation. *A fortiori*, there can be no intention that it shall apply to a homestead acquired by him upon land which is not part of the public domain and is not within any Indian reservation; and no language in the statute can reasonably be construed as giving it such extended meaning.

If, however, a homestead is provided for an Indian upon an existing Indian reservation or upon land acquired pursuant to the Act of June 18, 1934, and either proclaimed as a new Indian reservation or added to an existing one, the Act has direct application, unless rejected by a majority vote of the adult Indians, and it forbids allotments in severalty. In the absence of such rejection, the holding will be governed by that Act, which, to the extent of any conflict, must prevail over earlier legislation.

This also presents the question whether the funds provided in Section 208 of the National Industrial Recovery Act may be used for subsistence homesteads upon Indian reservations. In so far as Section 208 is concerned, there is no applicable restriction so long as the loan or other form of assistance comes within the stated purpose "to provide for aiding the redistribution of the overbalance of popula-

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tion in industrial centers," and my attention has been called to no other statute which would prevent such use.

Considering the foregoing, it is my opinion that the principle stated in the opinion of September 10, 1934, concerning collective ownership of subsistence homesteads is applicable to homesteads provided for Indians beyond the limits of an Indian reservation, but is inapplicable with respect to homesteads provided for Indians within an existing Indian reservation or upon land either proclaimed as a new reservation or added to an existing one under the Act of June 18, 1934, and subject to its provisions.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

CONSTRUCTION OF THE ACT OF JUNE 18, 1934, RELATING TO INDIAN LANDS

Section 18 of the act of June 18, 1934, relating to Indian lands and reservations, provides in part, "This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application."

***Held*, the words "this Act" cannot properly be considered as designating only a part, or parts, of the Act, and hence the third and succeeding provisos in section 3, quoted herein, will be inoperative if the vote under section 18 is against the application of the Act. The functions of the *proviso* stated.**

DEPARTMENT OF JUSTICE,
November 1, 1934.

SIR: I have your letter of October 20 requesting my opinion with respect to the proper interpretation of the Act of June 18, 1934 [48 Stat. 984], which provides, generally, that no land of any Indian reservation shall be allotted in severalty; that restrictions upon alienations of Indian lands are continued indefinitely; that the Secretary of the Interior may restore to tribal ownership remaining surplus lands of Indian reservations; that he may proclaim new Indian reservations upon lands acquired pursuant to the Act or add such lands to existing reservations, etc., and contains the following pertinent sections:

"SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore

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to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further*, That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further*, That patentee shall also pay into the Treas-

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ury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

"Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

"SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice." [48 Stat. 988.]

You state that the Papago Tribe of Indians is about to vote upon the application of the Act to them, as provided in Section 18, and in connection therewith you inquire whether a vote to reject the Act will operate to nullify the third and succeeding provisos of Section 3. In support of the view that the provisos might remain effective although the vote should be against the Act, it is suggested in the documents accompanying your letter that the provisos relate to matters not connected with the plan and purpose of the Act as a whole and were added to it as a mere matter of convenience.

As pointed out in *American Express Co.* v. *United States*, 212 U. S. 522, 534, a proviso *properly* restricts or makes clear that which has gone before, yet is not infrequently employed as a means of introducing into a law independent legislation. Even assuming, however, that the provisos in Section 3 were employed for the latter purpose, this supplies

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no justification for departing from the plain words of the statute. As stated by the Supreme Court in the cited case, "we are to consider the language which Congress has used in passing a given law, and when the language is plain and explicit our only province is to give effect to the act as plainly expressed in its terms."

It is my opinion that this case falls within the rule thus stated; that the words, "this Act," as used in Section 18, cannot properly be considered as designating only a part or parts of the Act; and that, therefore, the third and succeeding provisos in Section 3 will be inoperative if the vote under Section 18 is against the application of the Act.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

POWER OF THE ATTORNEY GENERAL IN MATTERS OF COMPROMISE

The Treasury Department has no discretion to review on the merits the action of the Attorney General in accepting an offer of compromise in a case under his control.

Section 5 of Executive Order No. 6166 of June 10, 1933, vests in the Attorney General exclusive control over any case after reference thereof to the Department of Justice. However, the Attorney General has plenary power, in part inherent in his office and in part derived from statutes and decisions, to compromise any case over which he has jurisdiction upon such terms as he may deem fit.

An offer of compromise accepted in accordance with law is binding upon the United States and its officers as well as the taxpayer.

The duty of one executive officer to carry into effect the discretionary acts of another is ministerial.

DEPARTMENT OF JUSTICE,
November 5, 1934.

SIR: I beg to acknowledge your letter of October 30, 1934, concerning the duties and responsibilities of the Treasury Department with respect to cases which have been referred to the Department of Justice since Executive Order No. 6166 of June 10, 1933, became effective.

In order to remove all doubt and confusion as to the duties and responsibilities of our respective departments with re-

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spect to a case which has been settled by the Department of Justice you request my opinion on the following question:

"What discretion, if any, resides in the Treasury to approve or disapprove, accept or reject, such settlements, and what duty, if any, rests upon the Treasury to inquire into the merits of such settlements before executing the direction of the Attorney General?"

It is my understanding that your question relates only to cases wherein your Department is called upon to make tax refunds after settlements have been agreed upon by this Department, and my answer to your question will be limited in its application to cases of that character.

A proper discussion of your question requires consideration of the authority of the Attorney General to make the settlements in question, and the effect thereof upon the Government and its officers.

Section 5 of Executive Order No. 6166, provides in part as follows:

"The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice."

The effect of the above quoted provision is to vest in the Attorney General exclusive control of any case after it has been referred to his department. It should be observed, however, that the provision did not in any way curtail the Attorney General's prior and plenary power. It merely withdrew from all other officers such power and authority as they theretofore held, leaving the Attorney General in plenary control of any case once it has been referred to the Department of Justice.

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The primary broad power of the Attorney General is in part inherent, appertaining to the office, and in part derived from various statutes and decisions. This power is plenary and carries with it the authority to make it effective, including authority to consider all matters germane to any case over which the Attorney General has obtained jurisdiction. See my supplemental opinion of October 2, 1934, and the authorities therein discussed and cited. He may dismiss a suit or abandon defense at any stage when in his sound professional discretion it is meet and proper so to do. It follows that he may compromise any case on such terms as he sees fit, including cases of the character involved herein. (23 Op. 507; 29 id. 217, 223).

An offer in compromise which has been accepted in accordance with law is binding on the United States and its officers as well as on the taxpayer. *Walker* v. *Alamo Foods Co.*, 16 F. (2d) 694; *Ely & Walker Dry Goods Co.* v. *United States*, 34 F. (2d) 429; *Du Puy* v. *United States*, 67 C. Cls. 348. Thus, where a taxpayer compromises his suit against the Government to recover an overpayment of taxes, the compromise is mutually binding and bars a second suit to recover further amounts for the same period. *Second National Bank of Saginaw* v. *Woodworth*, 66 F. (2d) 170; *Reynolds* v. *Gnichtel*, 1 Fed. Supp. 606.

It is well established that the duty of one executive officer to carry into effect the discretionary acts of another is ministerial. *Miguel* v. *McCarl*, 291 U. S. 442, 451; *McCarl* v. *United States, ex rel Societa Ligure Di Armamento, et al.*, 58 App. D. C. 319. It is likewise in the case of a judgment. See *Blair* v. *United States ex rel. Union Pacific R. R. Co.*, 6 F. (2d) 484 (App. D. C.). In that case the taxpayer had recovered a final judgment against the Collector of Internal Revenue in a United States District Court and had filed a claim for credit of the said judgment upon a current installment of his income taxes, which the Commissioner of Internal Revenue refused to allow. In sustaining the taxpayer's petition for a writ of mandamus, the Court, at page 486, said:

"The duty imposed upon the respondent, according to the conceded facts in the case, was mandatory, not discretionary; * * *."

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The acceptance of an offer in compromise by the Attorney General in a case of this character is somewhat analagous to a decision of the Board of Tax Appeals which has been declared by Congress to be an independent agency of the executive branch of the Government and so held by the Supreme Court. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 725. Sections 321 and 322 of the Revenue Act of 1932, c. 209, 47 Stat. 169 (U. S. C., Supp. VII, Title 26, Secs. 321 and 322), clearly show that the duty of making refunds due in those cases is mandatory.

It is, of course, elementary that there must be an appropriation available for the purpose of paying tax refunds. I understand, however, that there is an appropriation available for that purpose when it has been lawfully established that a taxpayer is entitled to a refund and that the Treasury Department is charged with the duty of making disbursements from that appropriation. See Treasury Appropriation Act of March 1934 (c. 70, 48 Stat. 425, 430).

The above considerations lead me to the conclusion that the Attorney General has ample power to terminate suits of the character involved by the acceptance of offers in compromise; that when he has so terminated such a suit his action is final and binding on all other executive officers of the Government as to the merits thereof and that such further duties as are necessary in connection with the cases are ministerial in character. I am constrained to advise you, therefore, that, in my opinion, there resides in the Treasury Department no discretion to review on the merits the action of the Attorney General in accepting an offer in compromise in a case which is under his control.

I desire to add in a spirit of cooperation that while responsibility for the exercise of discretion in these cases rests with this Department I do not understand that it was intended by Executive Order No. 6166 that the combined efforts of both departments might not be availed of where it would be beneficial to the United States from the standpoint of the work as a whole. I also feel, just as is the case with respect to our relations with other departments in connection with compromise matters, that it would be not only highly desirable but most helpful to continue to receive the

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views and recommendations of your Department. After all, both departments are serving the same interests and have a common end in view.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

EXCLUSION OF IMMIGRANTS FOR OFFENCES INVOLVING MORAL TURPITUDE—FORGERY

Forgery involves moral turpitude, and aliens who admit having committed acts of forgery in connection with applications for passports or visas, if such acts are prohibited by our passport and immigration laws, are excluded from admission into the United States under Section 5 of the Immigration Act of February 5, 1917.

In the various cases submitted the stated acts of the immigrant involve forgery, although in one case the facts stated do not show that the immigrant has admitted the forgery.

DEPARTMENT OF JUSTICE,
November 20, 1934.

SIR: I have the honor to refer to your letter of July 14, requesting my opinion whether offenses previously committed by present applicants for immigration visas involve moral turpitude, within the meaning of Section 3 of the Immigration Act, approved February 5, 1917, c. 29, 39 Stat. 874, 875 (U. S. C., Title 8, Sec. 136), excluding from admission into the United States "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude." In connection therewith you submit the following cases.

(1) In 1928 M. D. secured a nonquota immigration visa by falsely representing herself to be the wife of an American, whom she later married. In support of her application she submitted a fraudulent marriage certificate, furnished her by another. The fraud was detected and she was denied admission. She now seeks entry as the admitted wife of the American citizen.

(2) G. B. presented an American passport which had been issued in the name of P. V. and was altered to show the name "P. V." B. claims that he purchased the passport and that

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he does not know who altered it. The irregular entry was discovered and he departed from the United States.

(3–a) J. L., when 17 years of age, obtained a passport from an American consul, representing himself to be his cousin, an American citizen, and presenting the latter's birth certificate. He admits that he signed the name of his cousin to the passport application and upon the photograph attached to the passport. The irregular entry was detected and he left the United States. He is married to an American citizen.

(3–b) A. R-R. obtained a passport in the name of an American citizen, and admits signing the latter's name to the application.

(3–c) V. P. obtained an American passport by representing herself to be her sister, an American citizen, and presenting in connection therewith her sister's birth certificate. She admits signing her sister's name to the application.

These cases have been submitted to me, following discussions between representatives of our respective Departments, as cases which appear to come within the scope of the offenses described in the second sentence of the following paragraph contained in my opinion to you of October 13, 1933 (37 Op. 296).

"Bearing particularly upon such cases, and illustrating the principles hereinbefore stated, those which arose out of violations of our immigration law, or the passport law of this or another country, and involve false swearing amounting to perjury, constitute offenses involving moral turpitude. This is not true, however, where the violation consisted merely of subterfuge or concealment of a fact upon entering the country, using a foreign passport belonging to a friend or relative as an unwise convenience, using a foreign passport issued in the name of another with probable purpose to evade peacetime military service, and such violation was not accompanied by false swearing. The basic difference is that the taking of a false oath is considered wrong independently of statute (*Kaneda* v. *United States*, 278 F. 694, 699), while the other offenses, though grave and properly penalized, cannot be said to possess the same inherent base-

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ness in the concept of our people. The Legal Adviser of your Department has reached like conclusions."

It has been suggested, however, that while such misrepresentations, concealments and subterfuges do not involve moral turpitude, they may yet have been accompanied by forgery. Your Legal Adviser expressly states there has been no admission of any false swearing, which might constitute perjury; and it does not appear that there has been a conviction, or even a prosecution, for any crime.

I concur in the conclusion reached in your Department that forgery involves moral turpitude and that the acts said to have been participated in or committed by these aliens come within the letter of accepted definitions of forgery. This, however, is not alone sufficient. It is necessary that they must have been committed contrary to a law which forbade their doing; and in this connection my attention has been directed to the following provisions of our immigration and passport laws.

Act of May 26, 1924, c. 190, Sec. 22, 43 Stat. 153, 165 (U. S. C., Title 8, Sec. 220).

"Sec. 22. (a) Any person who knowingly (1) forges, counterfeits, alters, or falsely makes any immigration visa or permit, or (2) utters, uses, attempts to use, possesses, obtains, accepts, or receives any immigration visa or permit, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or who, except under direction of the Secretary of Labor or other proper officer, knowingly (3) possesses any blank permit, (4) engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, (5) makes any print, photograph, or impression in the likeness of any immigration visa or permit, or (6) has in his possession a distinctive paper which has been adopted by the Secretary of Labor for the printing of immigration visas or permits, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both.

"(b) Any individual who (1) when applying for an immigration visa or permit, or for admission to the United

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States, personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name, or (2) sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, an immigration visa or permit, to any person not authorized by law to receive such document, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both.

"(c) Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both."

Act of June 15, 1917, c. 30, Title IX, 40 Stat. 217, 227 (U. S. C., Title 22, Secs. 220–222):

"SEC. 2. Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than $2,000 or imprisoned not more than five years or both.

"SEC. 3. Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

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"SEC. 4. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made, forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, multilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein presecribed invalidating the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

The foregoing provisions are not expressly limited to the doing of such acts within the United States, and some of the things to which they relate would ordinarily be done in a foreign country.

Of pertinence in connection with the question whether it was intended that these provisions should operate beyond our borders, there is an interesting chapter in Moore's International Law Digest (v. 2, p. 225 et seq.), in which he states it to be an accepted principle "that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done" (a statement quoted with apparent approval by the Supreme Court in *Ford* v. *United States*, 273 U.S. 593, 623), but cites a number of instances in which we have questioned the right of foreign governments to punish American citizens for acts committed in this country, ranging from political plots to the mere making of "insulting remarks" about a foreign emperor.

Congress has, however, expressly provided that some laws enacted by it shall apply to offenses committed by aliens beyond our borders, as illustrated by the following provisions contained in Section 1750 of the Revised Statutes (U. S. C., Title 22, Sec. 131):

"SEC. 1750. Every secretary of legation and consular officer is hereby authorized, whenever he is required or deems it necessary or proper so to do, at the post, port, place, or within the limits of his legation, consulate, or commercial

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agency, to administer to or take from any person on oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to do within the United States. Every such oath, affirmation, affidavit, deposition, and notarial act administered, sworn, affirmed, taken, had, or done, by or before any such officer, when certified under his hand and seal of office, shall be as valid, and of like force and effect within the United States, to all intents and purposes, as if administered, sworn, affirmed, taken, had, or done, by or before any other person within the United States duly authorized and competent thereto. If any person shall wilfully and corruptly commit perjury, or by any means procure any person to commit perjury in any such oath, affirmation, affidavit, or deposition, within the intent and meaning of any act of Congress now or hereafter made, such offender may be charged, proceeded against, tried, convicted, and dealt with in any district of the United States, in the same manner, in all respects, as if such offense had been committed in the United States, before any officer duly authorized therein to administer or take such oath, affirmation, affidavit, or deposition, and shall be subject to the same punishment and disability therefor as are or shall be prescribed by any such act for such offense; and any document purporting to have affixed, impressed, or subscribed thereto or thereon the seal and signature of the officer administering or taking the same in testimony thereof, shall be admitted in evidence without proof of any such seal or signature being genuine or of the official character of such person; and if any person shall forge any such seal or signature, or shall tender in evidence any such document with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be deemed and taken to be guilty of a misdemeanor, and on conviction shall be imprisoned not exceeding three years nor less than one year, and fined in a sum not to exceed three thousand dollars, and may be charged, proceeded against, tried, convicted, and dealt with, therefor, in the district where he may be arrested or in custody."

It is not improbable that the aliens whose cases you have submitted also committed perjury, for they would ordinarily

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be required to swear to the truth of their statements and representations. It may be argued that such perjury does not come within this section because false statements in connection with applications for passports and visas are covered by other statutes, also hereinbefore mentioned. However, the question of perjury must be regarded as moot because the aliens have not admitted it, and the statute requires, in the absence of a conviction, an explicit admission in order to bar them for moral turpitude. *United States* v. *Williams*, 203 F. 155, 157; *Howes* v. *Tozer*, 3 F. (2) 849, 850–852. Section 1750 also deals with forgeries but, by its terms, at least, is limited to forgeries of consular seals and signatures.

There is, however, no fundamental reason for placing false oaths and false writings upon different moral planes because done in defiance of one statute rather than of another. As a matter of fact, an application for an immigration visa would appear to be directly subject to Section 1750 insofar, at least, as the notarial act of the consul is concerned. Apparently, the same fraud can be accomplished by forging the signature of the supposed applicant as by forging the seal and signature of the consul, and it is somewhat difficult to conclude that one is less reprehensible than the other.

I approve the conclusion reached in your Department that the making or uttering of forgeries in connection with such applications for passports or for visas, as well as the direct forging of a passport or visa, when contrary to the terms of the sections of the passport and immigration laws hereinbefore quoted, should be regarded as involving moral turpitude, when admitted by the alien, within the contemplation of the provision excluding from admission to the United States persons who admit having committed a crime involving moral turpitude.

I must concede, however, that the question is not entirely free from doubt and that persons whose judgment I respect have reached contrary conclusions. Apparently, they have been influenced by the fact that the provisions of the statutes which apply to forgeries in connection with passports and visas are not made applicable to offenses committed abroad

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in terms so clear as those contained in the statute relating to perjury in connection with notarial acts performed at American consulates and the forging of consular seals and signatures, and, furthermore, that aliens have not heretofore been excluded because of derelictions such as those described in your letter—evidencing a practice of undoubted weight.

There are also appealing circumstances in connection with some cases. M. D., as the intended wife of an American citizen, was potentially eligible to admission if he had adopted the requisite, although perhaps less convenient, course of going abroad to marry her in the first place as, apparently, he did later. Perhaps, looking at the matter in the abstract, one may doubt that her act of tendering the fabricated marriage certificate which had been furnished her was so grave that it should forever debar her from this country with resultant separation of a family or the expatriation of an American citizen. However, she uttered the forged certificate and also signed to the application for a visa a name which was not hers, and the statute vests us with no authority to condone.

Because of the doubts hereinbefore pointed out and because of the harsh results which, in some cases, would follow the application of the view herein adopted, I respectfully suggest the advisability of cooperation between your Department, the Department of Labor and this Department in affording the immigrants hereinbefore mentioned, or such of them as may care to avail themselves thereof, the fullest opportunity to obtain an adjudication, through test cases in our courts, of the correctness of the conclusion that they are not entitled to admission.

In the case of G. B., however, it does not appear to me that he has *admitted* the making or uttering of a forgery. Unless there is an admission more explicit than indicated by the statement of facts submitted with your letter, his case comes within the rule stated in *United States* v. *Williams* and *Howes* v. *Tozer*, *supra*.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF STATE.

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CIVIL SERVICE STATUS OF EMPLOYEES OF THE RAILROAD RETIREMENT BOARD

Employees of the Railroad Retirement Board are subject to the Civil Service Act, Classification Act, and the Economy Act of June 30, 1932, as amended.

Such employees are not subject to the Civil Service Retirement Act, but they may, through continuous service and necessary transfers and reinstatements, retain their rights thereunder in that they will again become subject to its provisions upon subsequent transfers from the Board to other Government service.

This opinion is subject to the ultimate determination of the constitutionality of the Railroad Retirement Act, which has been declared unconstitutional by the Supreme Court of the District of Columbia.

DEPARTMENT OF JUSTICE,
November 21, 1934.

SIR: I have the honor to refer to your letter of October 10 submitting for my opinion the following questions, propounded by the Railroad Retirement Board.

"1. To what extent, if any, are employees of the Railroad Retirement Board subject to the provisions of the Civil Service Act?

"2. The Railroad Retirement Act provides that employees of the Railroad Retirement Board shall contribute to the Railroad Retirement Fund. Must they also contribute to the Civil Service Disability and Retirement Fund?

"3. Are the employees of the Board subject to the Classification Act of 1923?

"4. Will the provisions of the Economy Act of June 30, 1932, as amended, apply to the Railroad Retirement Board and its employees?

"5. If employees under the Civil Service transfer to the Railroad Retirement Board may they retain their rights under the Civil Service Disability and Retirement Fund; and, if so, how?"

The Act of June 27, 1934 [48 Stat. 1283], entitled "An Act to provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes", contained the following pertinent provisions:

"SEC. 9. (a) PERSONNEL.—There is hereby established as an Independent agency in the executive branch of the Gov-

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ernment a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of the term and the terms of office of the members first taking office after the date of enactment of this Act shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years, after the date of enactment of this Act. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of the carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially, for a term of two years, without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any carrier or organization of employees. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board of whom a majority of those in office shall constitute a quorum for the transaction of business. Each of said members shall receive a salary of $10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on duties required by this Act. The members and employees of the Board shall be included as employees under this Act and together with employees receiving annuities shall be furnished free transportation in the same manner as such transportation is furnished to employees.

"(b) Duties.—The Board shall have and exercise all the duties and powers necessary to administer this Act. * * * The Board * * * shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities and employ such persons and provide for their compensa-

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tion and expenses, as may be necessary to the proper discharge of its functions." (48 Stat. 1287.)

As "an independent agency in the executive branch of the Government", the Board is subject to the provisions of the Civil Service Act and the Classification Act unless Congress has otherwise clearly provided. (26 Op. 363, 374; idem 502, 507; 34 Op. 48, 50). It has been pointed out, as of possible bearing, that the compensation of these employees does not come from the general funds of the United States, that Section 9 (a) provides "the members and employees of the Board shall be included as employees under this Act", and that the term "employee" is defined in the Act as meaning a "person in the service of a carrier", etc. As indicated in the first-cited opinion, supra, the application of the Civil Service Act and the Classification Act does not depend upon the technical status of the affected person as an employee of the United States. Furthermore, the obvious purpose of the quoted language was merely to subject the Board and its employees to particular provisions of the Act in common with employees of the railroads, and the words employed for the accomplishment of this purpose cannot overcome the fact, expressly declared in the statute, that the Board is part of the executive branch of the Government.

The amended Economy Act (approved March 20, 1933, c. 3, 48 Stat. 8, 12) defined the terms "officer" and "employee", as used therein, to mean "any person rendering services in or under any branch or service of the United States Government", with some exceptions which are not here pertinent. The Railroad Retirement Board and its employees come within this definition. The original Economy Act (approved June 30, 1932, c. 314, 47 Stat. 382, 400) had excepted "public officials and employees whose compensation is derived from assessments on banks and/or is not paid from the Federal Treasury", with the effect of exempting from its provisions "employees whose compensation was derived from trust funds and therefore not paid from appropriations from the general fund of the Treasury", as stated in my opinion of May 16, 1933 (37 Op. 144), to the Secretary of War concerning the compensation of employees of the Soldiers' Home; but this exception was eliminated in the later Act.

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The language of the Civil Service Retirement Act of July 3, 1926, c. 801, 44 Stat. 904, 905, as amended by the Act of May 29, 1930, c. 349, 46 Stat. 468, 470, is sufficiently broad to include the employees of the Railroad Retirement Board. However, the Act which created the Board expressly provided that it shall be subject to another and distinct retirement system, and this express direction must prevail over the general language employed in the earlier statute.

Considering the foregoing, it is my opinion that employees of the Railroad Retirement Board are subject to the Civil Service Act, the Classification Act and the Economy Act, but that they are not subject to the Civil Service Retirement Act. They may, however, through continuous service with necessary transfers or reinstatements, retain their rights under the Civil Service Retirement Act in the sense that they will again become subject to its provisions upon subsequent transfer from the Railroad Retirement Board to other Government service, in accordance with the principles stated in 34 Op. 192, 198, and 35 Op. 413, 418.

As you, of course, know the Railroad Retirement Act has been held unconstitutional by the Supreme Court of the District of Columbia. This opinion, therefore, is necessarily subject to the ultimate determination of the constitutionality of the Act of which the sections herein considered are a part.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

STATUS OF EMPLOYEES AFFECTED BY McKELLAR PROVISO IN THE EMERGENCY APPROPRIATION ACT, FISCAL YEAR 1935

The Secretary of the Treasury is not required by the McKellar proviso contained in the Emergency Appropriation Act, fiscal year 1935, to remove from the service the employees affected thereby either by outright separation or by a partial dismissal in the form of furlough, and he may continue such employees in a duty status without pay.

DEPARTMENT OF JUSTICE,
November 30, 1934.

SIR: I have the honor to refer to the letter of Acting Secretary of the Treasury Oliphant, dated November 28, 1934, wherein my opinion is requested upon certain questions aris-

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ing in connection with the Treasury Department's administration of the so-called McKellar Proviso, contained in the Emergency Appropriation Act, fiscal year 1935 (ch. 648, 48 Stat. 1061), under the heading "Bureau of Internal Revenue."

The questions submitted for my consideration by the Acting Secretary are as follows:

"1. Does the McKellar Proviso require the Secretary of the Treasury to remove the class of employees included within its scope from the service, either by outright separation or by a partial dismissal in the form of a furlough?

"2. If your answer to the first question is in the negative, is the Secretary of the Treasury authorized by law to continue the employees in question in a duty status without pay?"

The McKellar Proviso is in these words:

"*Provided*, That after December 1, 1934, no part of the appropriation made herein or heretofore made for the fiscal year 1935 shall be used to pay the salary of any person formerly employed as investigator, special agent, senior warehouseman, deputy prohibition administrator, agent, assistant attorney, assistant prohibition administrator, senior investigator, deputy production administrator, storekeeper or gauger, or any other position in the Prohibition Bureau or Alcoholic Beverage Unit, Department of Justice, who was separated from the service of such Bureau or Unit between June 10, 1933, and December 31, 1933, while in any such position in the Treasury Department, unless and until such person shall be appointed thereto as a result of an open, competitive examination to be hereafter held by the Civil Service Commission."

This proviso does not in express terms direct or require removal from the service of the employees included within its scope. Nor does it, in my opinion, do so by implication. The positions occupied by these employees and the salaries appertaining thereto were created and established under general statutes theretofore enacted by the Congress.

The proviso does not purport to abolish these positions. On the contrary, its language clearly indicates that the Con-

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gress did not intend to abolish them. It provides only that after December 1, 1934, no part of the appropriation made under the Act or theretofore made for the fiscal year 1935, shall be used to pay the salary of any employee falling within its provisions unless and until such employee shall have been appointed to the position occupied by him as a result of an open competitive examination thereafter to be held by the Civil Service Commission.

In view of the foregoing, and since it appears that the employees involved had been appointed to their positions in the Treasury Department pursuant to statutory authority at the time of the enactment of the proviso, it is clear that the proviso does not change or affect their status as employees in the Treasury Department, except with respect to the payment of their salaries.

Since this is so, it is my opinion that the proviso does not require the Secretary of the Treasury to remove these employees from the service, either by outright separation or by a partial dismissal in the form of a furlough. For the same reasons, and as a necessary corollary, it is my further opinion that they may be continued in the service in a duty status without pay.

The questions submitted by the Acting Secretary are answered accordingly, the first question being answered in the negative and the second in the affirmative.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

RESPONSIBILITY FOR MAINTENANCE OF THE NATIONAL ARCHIVES BUILDING

General statutory provisions and the Executive Order of June 10, 1933, would vest the responsibility for operation and maintenance of the Archives Building in the office of National Buildings, Parks, and Reservations, whereas the act of June 19, 1934, c. 668, 48 Stat. 1122, authorizes future appropriations for the maintenance of the Archives Building to be expended under the direction of the Archivist of the United States and indicates an apparent purpose to preserve the authority of the office of National Buildings, Parks, and Reservations, an inconsistency thus being created.

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The President is advised to recommend to Congress that the appropriation, when made, for the operation and maintenance of the Archives Building be so worded as to show conclusively whether the responsibility for such operation and maintenance is vested in the office of National Buildings, Parks, and Reservations or in the Archivist of the United States.

DEPARTMENT OF JUSTICE,
December 4, 1934.

SIR: I have your request of November 15 for my opinion whether the maintenance and operation of the National Archives Building, when completed, will be the responsibility of the Director of National Buildings, Parks, and Reservations or of the Archivist of the United States.

The Act of June 19, 1934, c. 668, 48 Stat. 1122, created the office of Archivist of the United States and contained the following pertinent sections:

"SEC. 4. The immediate custody and control of the National Archives Building and such other buildings, grounds, and equipment as may from time to time become a part of the National Archives Establishment (except as the same is vested by law in the Director of National Buildings. Parks, and Reservations) and their contents shall be vested in the Archivist of the United States.

"SEC. 10. That there are hereby authorized such appropriations as may be necessary for the maintenance of the National Archives Building and the administration of the collections, the expenses, and work of the Commission on National Historical Publications, the supply of necessary equipment and expenses incidental to the operations aforesaid, including transfer of records to the Archives Building; printing and binding; personal services in the District of Columbia and elsewhere; travel and subsistence and per diem in lieu of subsistence, notwithstanding the provisions of any other Acts; stenographic services by contract or otherwise as may be deemed necessary; purchases and exchange of books and maps; purchase, exchange, and operation of motor vehicles; and all absolutely necessary contingent expenses, all to be expended under the direction of the Archivist, who shall annually submit to Congress estimates therefor in the manner prescribed by law.

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"SEC. 11. All Acts or parts of Acts relating to the charge and superintendency, custody, preservation, and disposition of official papers and documents of executive departments and other governmental agencies inconsistent with the provisions of this Act are hereby repealed."

The several statutory provisions included in the United States Code as Section 1 and Sections 9 to 19, inclusive, of Title 40, vested "the control and allotment of space in owned or leased government buildings in the District of Columbia," with some exceptions not here pertinent, in a Public Buildings Commission, vested "the responsibility for the care, maintenance and protection" of buildings occupied by the State Department, War Department, Navy Department, Department of Justice, Department of Commerce, Department of Labor, Treasury Department, Pension Office, Patent Office, General Land Office, Civil Service Commission, and Interstate Commerce Commission, in the Director of Public Buildings and Public Parks of the National Capital, and then contained, in Section 19, the following general provision:

"The said Director of Public Buildings and Public Parks shall also have charge of all other public buildings and grounds in the District of Columbia, under such regulations as may be prescribed by the President, through the War Department, except those buildings and grounds which are otherwise provided for by law."

Immediately following, in Section 20, is a provision that the Director shall submit annually "a report of his operations for the preceding year, with an account of the manner in which all appropriations for public buildings and grounds have been applied, including a statement * * * of the condition of the public buildings and grounds, and of the measures necessary to be taken for the care and preservation of all public property under his charge."

By Executive Order of June 10, 1933, the Public Buildings Commission and the office of Public Buildings and Public Parks of the National Capital were abolished and their functions, including specifically "all functions of administration of public buildings," etc., were "consolidated in an Office of National Parks, Buildings, and Reservations in

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the Department of the Interior, at the head of which shall be a director of national parks, buildings, and reservations."

The effect and purpose of these provisions in the Executive order were considered in my opinion to you of September 18, 1933 (37 Op. 274), and in my opinion of November 7, 1933, to the Secretary of the Interior (37 Op. 340). As stated in the last mentioned opinion, the new buildings authorized by the Act of July 3, 1930, c. 846, 46 Stat. 860, 907 (including the new Archives Building), were provided "in recognition of, and in view of caring for, the particular needs of the Departments and Offices named", but with power in the Public Buildings Commission (transferred by the Executive order to the Office of National Parks, Buildings, and Reservations) to assign the space therein, if there is any surplus space, to the end that it shall not lie idle while at the same time another Department is in need of additional space.

It is thus the clear policy of the Government to centralize the responsibility for maintenance and operation of public buildings in the District of Columbia, and, as a corollary, it is not the policy to vest this responsibility in the administrative heads of the Departments or independent establishments occupying such buildings. Section 4 of the Act of June 19, 1934, vesting in the Archivist of the United States "the immediate custody and control of the National Archives Building * * * (except as the same is vested by law in the Director of National Buildings, Parks, and Reservations)" apparently recognizes this policy and the probable application to the Archives Building of the above mentioned statutes and executive order.

The provision in Section 10 "that there are hereby authorized such appropriations as may be necessary for the *maintenance of the National Archives Building* and the administration of the collections * * * all to be expended under the direction of the Archivist," contains no repeal of any existing legislation; and Section 11 which purports to repeal inconsistent acts and parts of acts, mentions no act relating to operation and maintenance of public buildings.

As the matter now stands, general statutory provisions and the Executive Order of June 10, 1933, would vest the respon-

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sibility for operation and maintenance of the Archives Building in the Office of National Buildings, Parks, and Reservations while Section 10 of the Act of June 19, 1934 "authorizes" future appropriations for its maintenance "to be expended under the direction of the Archivist," presenting both an anomaly and inconsistency since the last-mentioned Act not only did not repeal or modify the prior legislation but actually, in Section 4, indicated an apparent purpose to preserve the authority of the Office of National Buildings, Parks, and Reservations. Until the building is completed and some appropriation for its maintenance is made the question may be regarded largely as moot, with the ultimate answer subject to be affected by the appropriation when made.

I think the exigencies require that when the appropriation for maintenance of the Archives Building is made it be so worded as to show conclusively the intention that it shall be expended by and under the direction of the Office of National Buildings, Parks, and Reservations of the Department of the Interior, and I respectfully advise that you so recommend to Congress unless, of course, it shall be the intention to vest the responsibility for operation and maintenance in the Archivist, in which event the exigencies even more strongly require a clear legislative statement of such purpose.

Respectfully,

HOMER CUMMINGS.

To the President.

FURNISHING ASSISTANCE TO AIRCRAFT UNDER THE AIR COMMERCE ACT OF 1926

The existence in any aircraft of a state of disrepair or other inappropriateness for safe flight, including lack or shortage of fuel, oil, equipment, or supplies, apparent when assistance is requested, is sufficient to justify the furnishing of assistance to such aircraft under the Air Commerce Act of 1926, provided that the need has reasonable relation to an actual and definite flight.

The meaning of the term "emergency" considered.

Department of Justice,
December 7, 1934.

Sir: I have the honor to refer to our recent exchange of communications and to enclose herewith, for your information, copies of letters addressed to me under date of Septem-

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ber 8, 1934, by the Secretary of State and under date of November 2, 1934, by the Secretary of Commerce, in connection with your request for my opinion regarding the authority of the Army Air Corps, in the Canal Zone and in the Philippine Islands, to repair and service private airplanes, commercial airplanes, and airplanes of the Republic of Panama.

You state that a difference of opinion exists between your Department and the Department of Commerce, but all concerned apparently agree that the matter is governed entirely by the following paragraph of the Air Commerce Act of 1926 (44 Stat. pt. 2, pp. 568, 571):

"The head of any Government department or other independent establishment having jurisdiction over any airport or emergency landing field owned or operated by the United States may provide for the sale to any aircraft of fuel, oil, equipment, and supplies, and the furnishing to it of mechanical service, temporary shelter, and other assistance under such regulations as the head of the department or establishment may prescribe, *but only if such action is by reason of an emergency necessary to the continuance of such aircraft on its course to the nearest airport operated by private enterprise.* All such articles shall be sold and such assistance furnished at the fair market value prevailing locally as ascertained by the head of such department or establishment. All amounts received under this subdivision shall be covered into the Treasury; but that part of such amounts which, in the judgment of the head of the department or establishment, is equivalent to the cost of the fuel, oil, equipment, supplies, services, shelter, or other assistance so sold or furnished shall be credited to the appropriation from which such cost was paid, and the balance, if any, shall be credited to miscellaneous receipts."

The Secretary of Commerce quotes the Bureau of Air Commerce to the effect that—

"On or about May first of the current year, the War Department issued an order based upon its construction of the Air Commerce Act prohibiting the Air Corps from any longer repairing private and commercial airplanes or selling aircraft supplies or equipment to owners or operators

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of such aircraft in the Canal Zone or the Republic of Panama."

I have been furnished with no copy of any such order. On the contrary, the documents submitted to me indicate that you have no doubt of your authority to make such repairs and to sell such supplies and equipment "if such action is by reason of an emergency necessary to the continuance of such aircraft on its course to the nearest airport operated by private enterprise."

Concerning the limitation marked by the quoted words, the Bureau of Air Commerce suggests that "'emergency,' which is the term primarily in issue, should be given the connotation of straitened or necessitous, both of which are to be found as synonymous with emergency in the Webster's New International Dictionary."

It is also apparent from the correspondence with your Department and with the other Departments mentioned that there are no adequate private facilities for the servicing of airplanes in the Republic of Panama, the Canal Zone and the Philippines; and, apparently, there is a view that this situation may in itself present an emergency.

The Circuit Court of Appeals for the Eighth Circuit, in *United States* v. *Southern Pac. Co.*, 209 F. 562, 566, considered the definitions of Webster and other authorities. when seeking the meaning of the word "emergency" as used in a federal statute relating to operation of railroads. It pointed out that conditions consequent upon "usual causes" would not amount to emergencies; that even "sudden illness," though it might in the first place present an emergency, with lapse of time would cease to do so; and that each case must depend upon its own facts.

It has also been concluded in the following cases, and in the cases therein cited, that a condition sorely requiring a remedy but which has existed for an appreciable time cannot be said to present an "emergency," within the common meaning of the word.

De Angelis v. *Laino*, 252 N. Y. S. 871, 885:

"The danger of fire hazard in the above schools has existed since the construction of the same. It is no worse now than it has been for many years past. The mere fact

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that the Strayer report focuses attention on it does not convert it into an emergency, at least, not as a matter of law. It, at least, points to the existence of an exigency 'where something helpful needs to be done at once; an emergency is more pressing, and naturally less common than an exigency.' *Hurst* v. *City of Millersburg*, 220 Ky. 108, 111, 294 S. W. 788, 789. The statute in question does not cover an exigency."

Brooklyn City R. Co. v. *Whalen*, 182 N. Y. S. 283, 286:

"The appellant contends that the maintenance of the bus lines is justified by emergency, and the inadequacy of the service of the street railway lines is put forward as creating the emergency. * * * The word 'emergency' is defined as a sudden or unexpected occurrence or condition, calling for immediate action. This can hardly be applied to a permanent condition of inadequacy of service * * *."

However, it would be highly impracticable to adhere too rigidly to the idea of suddenness or unexpectedness as applied to a state of disrepair in an airplane which, while in actual flight to some destination, lands at an army airport to seek assistance. At some time between the perhaps scarcely perceptible beginning of disrepair and the final breakdown of an airplane from such cause there is undoubtedly an emergency. Dictates both of humanity and of common sense repel the idea that Congress intended to withhold the aid provided by the statute until a breakdown should be imminent or intended that an airplane in an admitted state of disrepair should be sent on its course in such condition or with only such limited adjustments and replacements as might, in some one's not infallible judgment, be sufficient to enable it to reach the nearest airport operated by private enterprise. Furthermore, this would be inconsistent with the intention professed in both the House and the Senate to foster safe flying by fit planes. (H. Rept. 572; S. Rept. 2, 69th Cong.)

In my opinion the conclusion is required, in order to give the statute reasonable operation and to avoid results obviously not intended, that the existence of a state of disrepair or other inappropriateness for safe flight, including lack or shortage of fuel, oil, equipment or supplies, apparent

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when assistance is requested, is sufficient to justify its rendition under the statute, provided that the need has reasonable relation to some actual and definite flight. Each case will depend largely upon its own peculiar facts. It is probable that some cases which it has been suggested ought to be provided for as a matter of policy will not come within the rule herein stated, but, in the absence of additional legislation, you are not authorized to sell supplies and equipment or to render services beyond the limitation expressed in the 1926 statute.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

JURISDICTION OF THE ATTORNEY GENERAL—CERTAIN CASES IN WHICH THE ATTORNEY GENERAL WILL NOT RENDER AN OPINION

The Attorney General is without authority to render an opinion upon a question already considered and decided by the official presenting the question, and he will decline to render an opinion upon a question contemporaneously pending before the courts for determination.

DEPARTMENT OF JUSTICE,
December 14, 1934.

SIR: I have your letter of October 5, 1934, in which you invite attention to the decision of the Supreme Court in the case of *Lynch* v. *United States* (292 U. S. 571), and state that you have considered the effect of this decision relative to claims arising under Section 305 of the World War Veterans' Act (43 Stat. 626), as amended, and have decided that this decision cannot be taken as enunciating the principle that Section 305 is such a provision of law as Section 17 of the Economy Act approved March 20, 1933 (Public No. 2, 73d Congress, 48 Stat. 11) could not validly repeal. You express the view that litigation will result from your administrative action and inasmuch as this Department will have the duty of defending the Government's position in court you request my opinion as to whether the views of this Department coincide with those of the Veterans' Administration.

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It appears from your letter that I am not called upon to give an opinion upon a question of law now pending and undetermined in the Veterans' Administration but am asked to give an opinion upon a question which you have already considered and decided. It has been held by my predecessors that this Department possesses no jurisdiction under the law to revise a conclusion already reached and about which the official presenting the question merely desires my confirmatory opinion, (20 Op. 440). Furthermore, I am advised that a similar question is now before the United States District Court for the District of Nebraska in the case of *Mrs. Emma Thomas, Administratrix of the Estate of James A. Hakel, deceased*, v. *United States*, involving a claim for insurance benefits under Section 309 of the World War Veterans' Act, as amended. This Department has heretofore followed the practice of declining to render opinions upon questions contemporaneously pending before the courts for determination and which are within their competency to decide.

For the reasons above stated, I regret that I am unable to comply with your request.

Respectfully,

HOMER CUMMINGS.

To the ADMINISTRATOR OF VETERANS' AFFAIRS.

CONSTRUCTION OF EIGHT HOUR LAW WITH REFERENCE TO DREDGE WORKERS

Members of the crew of a dredge or other like floating plant are not laborers or mechanics within the meaning of the act of June 19, 1912, 36 Stat. 137, relating to the employment of laborers and mechanics on work performed under contract for the United States, and the provisions of the act are not applicable to their employment.

DEPARTMENT OF JUSTICE,
December 31, 1934.

SIR: I have your letter of December 3, requesting my opinion whether members of the crew of a dredge or other floating plant are laborers or mechanics within the meaning of the Act of June 19, 1912, c. 174, 37 Stat. 137 (U. S. C., Title 40, Sec. 324), and whether the custom of "trading shifts," said to be practiced among them, is within the

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inhibition of that Act relating to the employment of laborers and mechanics on work performed under contract for the United States.

The alleged custom of "trading shifts" is illustrated by the following statement of a contractor in explanation of an apparent violation called to attention by your Department:

"This was due to an old custom among our union operators and engineers which they call 'Trading Shifts.' In the above instance, our chief operator, O. Tollakson, whose shift began at 7 A. M., wanted to be absent that shift so he could take in the American Legion convention and see the parade, etc. and arranged with Larsen and Selee to work his shift for him. Consequently he now owes each of them one half day's work which he will work out for them at such time as they may want to be absent during their future shifts.

"We do not recognize this shift trading and in the present instance Tollakson was paid a full day's pay for Tuesday, even though absent, and Larsen and Selee were each paid a day's pay only and without overtime.

"In such cases we pay no overtime and no money changes hands. These men all belong to the same union and we pay no attention to such trades as long as we get results on the work."

The Act of June 19, 1912, reads, in part, as follows:

"That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work * * *." (37 Stat. 137.)

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I approve the Judge Advocate General's conclusion that one who is charged by statute, and has undertaken by contract, not to *permit* his employees to work more than eight hours a day cannot escape responsibility by pleading that the men worked voluntarily and that he paid no attention to such detail. Other factors, however, require consideration, as pointed out in your letter.

The foregoing statute prescribed a civil penalty. In connection therewith it is necessary to consider a penal statute upon the same subject, which was then in effect and was saved from modification or repeal by an express provision in the later Act. I refer to the Act of August 1, 1892, c. 352, 27 Stat. 340 (U. S. C., Title 40, Secs. 321–323), which is copied below:

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

"Sec. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof."

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Section 4612 of the Revised Statutes (U. S. C., Title 46, Sec. 713), which was in effect when each of the foregoing acts was passed and is still effective, provided that "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board" a vessel belonging to a citizen of the United States "shall be deemed and taken to be a 'seaman'", and it defined "vessel" as comprehending "every description of vessel navigating on any sea or channel, lake or river * * *." Referring to this section, the Supreme Court concluded that workers on floating dredges, who are "seamen" within its provisions, cannot be considered as "laborers" or "mechanics" under the Act of August 1, 1892. *Ellis* v. *United States*, 206 U. S. 246, 259.

The case cited was decided May 13, 1907. Subsequently, Congress again used the words "laborers" and "mechanics" in the Act of June 19, 1912, with necessary effect as indicated in the following excerpt from an opinion rendered by Attorney General Wickersham under date of November 27, 1912 (29 Op. 583, 586).

"Clearly the Act of June 19, 1912 (37 Stat. 137), must receive the same construction. That statute was passed for the purpose of enlarging the scope of the eight-hour law so that it should not be confined to labor on 'the public works of the United States,' but should apply to all Government contracts generally. It did not, however, purport to enlarge the class of employees entitled to the benefit of the act but limited it, as before, to 'laborers or mechanics.' These words had, as has been pointed out, received a fixed judicial construction so as not to include 'seamen' and the term 'seamen' had been held to include all persons serving in any capacity on vessels such as dredges, scows, barges, etc. As Congress deliberately chose to retain the term 'laborers or mechanics' in the act of June 19, 1912, after it had been the subject of judicial interpretation, that interpretation must be read into the act, so that persons employed on dredges are no more within the provisions of this later act than they were within those of the earlier act of August 1, 1892."

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Later, by the Act of March 3, 1913, c. 106, 37 Stat. 726, Congress amended the Act of August 1, 1892 (the penal statute), so as to make it applicable both to "laborers and mechanics" and to all persons performing "services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor," with a proviso that nothing contained therein should apply to such dredge workers "while not directly operating dredging or rock excavating machinery or tools." The purpose of this amendment was thus stated by the Senate committee which reported it (S. Rept. 1056, 62d Cong., 2d Sess.):

"The legislation provided for in the bill makes the eight-hour workday applicable to dredge workers on Government work just as it is now applicable to other workers on Government work. By a decision of the United States Supreme Court in *Ellis* v. *The United States* (206 U. S. 246) it was held that the words 'laborers and mechanics' in the act of 1892 do not include workmen engaged in ocean dredging; that the latter fall within the category of seamen and were subject to maritime jurisdiction. The proposed legislation supplies this omission in the law and brings workers in Government dredging and in dredging for the Government under the eight-hour day."

The amendment did not affect the prior holdings that dredge workers are not laborers or mechanics, within the meaning of those words as used in the eight-hour legislation. It merely provided for what the committee termed an "omission in the law" by extending it to dredge workers performing duties of the nature indicated *in addition* to "laborers and mechanics," and it expressly amended only the penal statute, using no language even remotely suggestive of purpose also to amend the separate statute providing for a civil penalty. If in this, Congress evidenced a view that dredge workers (or some of them) should be subject to the requirements of the eight-hour laws, it also evidenced legislative acceptance of the prior holdings that dredge workers are not "laborers and mechanics," within the meaning of the words as used in those laws.

Considering the foregoing, it is my opinion that members of the crew of a dredge or other like floating plant are not

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to be deemed laborers or mechanics within the meaning of the Act of June 19, 1912, and that its provisions are not applicable with respect to their employment. Of course, you will understand that this conclusion is limited to the Act mentioned and is without bearing upon the application of the penal statute which is also discussed herein.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

OFFICE OF RECORDER OF DEEDS OF THE DISTRICT OF COLUMBIA

The Recorder of Deeds of the District of Columbia is an officer of the municipal government of the District of Columbia. Such officer is required by law to submit estimates for appropriations for his office to the Commissioners of the District of Columbia, and to submit to hearings by the Commissioners on such estimates.

DEPARTMENT OF JUSTICE,
January 3, 1935.

SIR: I have your memorandum of December 21, transmitting for my consideration the following questions submitted by the Recorder of Deeds of the District of Columbia:

"First: Whether or not the office of the Recorder of Deeds of the District of Columbia is an independent office, not attached either to the government of the District of Columbia or to any department of the general government.

"Second: If question Number one is answered in the affirmative, is it mandatory that the Recorder transmit through the District government its estimates covering appropriations; or submit to a hearing on said estimates before the Commissioners of the District of Columbia, or in any wise submit to the jurisdiction of the Board of Commissioners of the said District of Columbia.

"Third: Whether there is not vested in said Recorder of Deeds the right to submit directly to the various departments of the government for direct action any matter pertaining to the finances or conduct of his office."

The Act of Congress of March 3, 1801, c. 24, 2 Stat. 115, imposed upon the Clerk of the Circuit Court of the District

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of Columbia "the same duties respecting the recording of deeds * * * as are now performed * * * by the clerks of the counties of the respective states of Maryland and Virginia." The Act of February 14, 1863, c. 34, 12 Stat. 651, created the office of Register of Deeds, to be appointed by the President by and with the advice and consent of the Senate, and charged him with "all the duties respecting the recording of deeds and other instruments of writing" theretofore performed by the Clerk of the Circuit Court. The title of the office was changed to "Recorder of Deeds" by the Act of March 3, 1869, c. 151, 15 Stat. 341.

The Act of February 21, 1871, c. 62, 16 Stat. 419, 425, provided that the office and duties of Recorder of Deeds "shall remain as under existing laws till modified by act of congress", but authorized the local legislative assembly (subsequently abolished by the Act of June 20, 1874, c. 337, 18 Stat. 116) to impose upon him "such additional duties * * * as may be necessary to the due enforcement of the laws of said District." The Court of Appeals has stated that "the Recorder of Deeds is in the category of ministerial officers." *Dancy* v. *Clark*, 24 App. D. C. 487, 499.

Until 1926 the fees collected by the office were applied directly to its support. Senate Report No. 490, 69th Cong. 1st sess. By the Act of April 24, 1926, c. 176, 44 Stat. 322, all such fees are now required to be paid "to the Collector of Taxes for the District of Columbia for deposit in the Treasury of the United States to the credit of the District of Columbia." It is also provided by the same Act that "the annual estimates of appropriations for the government of the District of Columbia * * * shall include estimates of appropriations for the operation and maintenance" of the office of Recorder of Deeds. The Senate Committee reporting the bill (Report No. 490, *supra*) had stated a purpose to place the office of Recorder of Deeds "on the same basis as other district offices" and to require the submission of estimates for appropriations "in the regular way."

Under the Budget and Accounting Act of 1921, c. 18, 42 Stat. 20, 23 (U. S. C., Title 31, sections 1, 23), estimates for each "department or establishment", defined as "including the municipal government of the District of Columbia", are

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required to be submitted by "the heads" thereof to the Bureau of the Budget. The Commissioners of the District of Columbia (appointed by the President by and with the advice and consent of the Senate) undoubtedly occupy the position of "head" of the municipal government of the District. In addition to the various specific powers which Congress has conferred upon them, they are vested generally with "the executive power" and charged to "take care that the laws be faithfully executed", such general powers having been vested in the Governor of the District of Columbia by Sections 3 and 6 of the Revised Statutes of the District and transferred to the Commissioners, after the office of Governor was abolished, by the Act of June 20, 1874, c. 337, 18 Stat. 116, and the Act of June 11, 1878, c. 180, 20 Stat. 102, 103 (D. C. Code, 1930, Title 20, Secs. 9, 11).

Since passage of the Act of April 24, 1926, as I have been informed, upon inquiry, the estimates for appropriations for the office of Recorder of Deeds have been considered by the Commissioners and included in the total estimates for the municipal government. The Recorder of Deeds has at times questioned the propriety of this procedure but both the Commissioners and the Bureau of the Budget have insisted that it be followed.

Apparently it has been the view of the Recorder of Deeds that he is accountable only to the President because the President appoints him. This, however, is unsound. The President has always appointed many subordinate officers, and it is established practice that the manner of their appointment does not relieve them of that accountability to their superiors, other than the President, which is essential to orderly administration.

Considering the foregoing, it is my opinion that the Recorder of Deeds is an officer of the municipal government of the District of Columbia, is charged by statute with the duty of submitting his estimates for appropriations to the Commissioners of the District of Columbia in the same manner as other officers of the municipal government, and is required, as a necessary concomitant, to submit to hearings by the Commissioners concerning such estimates. Insofar as the third question may appear to comprehend matters other

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than estimates for appropriations, it is stated at the office of the Commissioners that the Recorder of Deeds does communicate directly with the departments and that they have not questioned his right to do so—which, I think, makes further consideration of the question unnecessary at the present time.

Respectfully,

WILLIAM STANLEY,
Acting Attorney General.

To the PRESIDENT.

VALIDITY OF A PROPOSED BOND ISSUE OF PUERTO RICO

The proposed bond issue of Puerto Rico in the amount of $75,000 for the retirement of bonds issued for financing the construction of the Isabella Irrigation System is authorized under the acts and Executive order cited herein; and the form of bond submitted complies with the law and the determinations of the Treasurer of Puerto Rico approved by the Governor.

DEPARTMENT OF JUSTICE,
January 9, 1935.

SIR: I have your letters of December 6 and January 5, stating that your Department has been authorized to sell for the account of the Government of Puerto Rico bonds of the face value of $75,000, the proceeds of which are to be used in the payment of the principal of bonds heretofore issued and sold in connection with the construction of the Isabela Irrigation System, and requesting my opinion concerning their legality.

It is proposed to issue the bonds under authority contained in Section 3 of the Act of Congress approved March 2, 1917, entitled "An Act to provide a civil government for Puerto Rico, and for other purposes," as amended by the Act of March 4, 1927 (c. 145, 39 Stat. 951, 953; c. 503, 44 Stat. 1418; U. S. C., Title 48, sections 741, 745), and Act No. 59 of the Legislature of Puerto Rico, approved June 18, 1919, as amended by Act No. 61, approved July 21, 1923, and Act 29, approved May 1, 1934, as modified by the Joint Resolution of Congress approved June 5, 1933, "To assure uniform value to the coins and currencies of the United States" (48 Stat. 112), and by Executive Order No. 6726 of May 29, 1934, issued under authority contained in the Act of

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Congress of March 3, 1933 (47 Stat. 1489, 1517), providing for reorganizations within the executive branch of the Government.

You state that they are to be issued in coupon form, in the denomination of $1,000 each, to be dated January 1, 1935, and to bear interest at the rate of 4¼ per centum per annum, payable at the Treasury of the United States semi-annually on January 1 and July 1 of each year, the principal thereof to be payable January 1, 1974, reserving, however, to the People of Puerto Rico the right to redeem all or any number of the said bonds at 5 per centum above par, with accrued interest, on January 1, 1945, or on any interest payment date thereafter, upon giving six months' notice in such manner as may be prescribed by the Treasurer of Puerto Rico. A copy of the form of the proposed bond was submitted with your letter.

Section 3 of the Act of March 2, 1917, as amended, provides:

"* * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Puerto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however*, That no public indebtedness of Puerto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Puerto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Puerto Rico has heretofore been pledged and bonds issued by the people of Puerto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Puerto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Puerto Rico is pledged shall be counted."

Your letter and the documents submitted by you show that the aggregate assessed valuation of real and personal property in Puerto Rico on July 1, 1934, amounted to $297,119,629, that on the said date there were outstanding bonds of the Government of Puerto Rico of the face value

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of $27,675,000, and notes evidencing temporary loans of the face value of $863,494.54, that since the amendatory act of March 4, 1927, the good faith of the people of Puerto Rico has been pledged to the payment of principal and interest on outstanding municipal bonds aggregating $1,235,500, which under the statute must be added to the foregoing, making a total of $29,973,994.54. From this amount, however, there is to be deducted $503,043.16, representing the amount accumulated in the various sinking funds, pledged by statute and applicable only to the payment of unmatured obligations included in the foregoing total figures. (35 Op. 9, 14; 37 id. 30, 32.) This makes a net total of $29,470,951.38 to be considered as the present indebtedness of the Government of Puerto Rico within the meaning of the Act of Congress, and the contemplated issue will not increase this to an amount beyond 10 per centum of the aggregate of the assessed valuation, the maximum permitted by law.

The Act of the Legislature of June 18, 1919, as amended by the Act of July 21, 1923, authorized a total bond issue of $3,325,000 for construction of the irrigation system, to mature in series of $75,000 each on January 1 of the year 1929 and subsequent years. The bonds were duly issued and approved as to validity (34 Op. 331), and one such series will mature on January 1, 1935.

Section 2 authorized the issuance of refunding bonds to pay the principal of issues falling due in years when the special assessments provided for such purpose should be insufficient. Later acts of the legislature authorized several series of bonds both for refunding and for operation and maintenance to meet exigencies which had required temporary reductions in assessments, and such bonds have also been duly issued and approved. (Opinion of Oct. 21, 1933, 37 Op. 300.) The authority contained in Section 2 is now to be availed of, and that section, as amended by the Act of May 1, 1934, reads as follows:

"SECTION 2. Should the proceeds of the special assessment as provided for in the Act above mentioned (Section 29), be insufficient in any year to meet the entire amount of the payment of the principal on outstanding bonds falling due that year in addition to the other necessary pay-

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ments, as provided in the aforesaid Act, then the Treasurer of Puerto Rico may, with the approval of the Governor, issue new refunding bonds to the amount necessary to pay the principal falling due during the said year; *Provided*, That should no tax be paid on lands in the temporary or permanent irrigation district during any year as provided for in Sections 24 and 29 of the above-mentioned Act, or should the amount received from taxes upon the lands in the said district be so reduced because of the operation of the said sections as to require it, then the Treasurer of Puerto Rico may, with the approval of the Governor, issue such additional bonds as may be necessary to cover all expenses and to meet all the obligations of the irrigation system for the said year; *Provided*, That the total amount of such additional bonds, issued to cover expenses and to meet obligations of the irrigation system during any year or years in which in accordance with the provisions of Sections 24 and 29 of the aforesaid Act, no tax is paid on lands in the said irrigation district, in which the amount received from taxes is insufficient to meet the said expenses and obligations of the irrigation system, shall not at any time exceed the total amount of irrigation bonds previously authorized; *And provided, further*, That the aforesaid refunding bonds shall be issued in series which shall not exceed seventy-five thousand (75,000) dollars each, of like denominations, and under the same terms and conditions, and shall bear interest at the same rate provided in Section 4 of this Act. The said refunding bonds shall mature in series in the order of their issue. The first series of refunding bonds shall mature January 1, 1974, and each of the following series shall mature on the first day of January of each of the following years; but any or all of the series of refunding bonds may be redeemed, at the will of The People of Puerto Rico, ten years after the date of their issue, at five (5) per cent above par, and accrued interest, on any interest payment date, by giving six months notice in such manner as may be prescribed by the Treasurer of Puerto Rico."

The 1919 Act provides, in particulars which are unchanged, that the bonds may be in coupon or registered form, in denominations of one thousand, five thousand and

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(or) ten thousand dollars, and shall bear interest at a rate not exceeding 4½ per centum per annum, payable semi-annually; that the bonds may be sold by the Secretary of War, or by the Treasurer of Puerto Rico, or by any fiscal agent appointed by the Treasurer, with the approval of the Governor, upon such terms as may be most favorable to the People of Puerto Rico, as near the date of issuance as practicable; and that the Treasurer with the approval of the Governor, under the limitations prescribed therein, shall have entire charge and authority in connection with all matters relating to said bonds. For the payment of both principal and interest the good faith of the People of Puerto Rico is irrevocably pledged.

The Executive order hereinbefore mentioned, which was issued under date of May 29, 1934, and transmitted to Congress, as required by the Act of March 3, 1933, had the effect of modifying the Act of the Legislature so as to transfer from the Secretary of War to the Secretary of the Interior the authority to sell the bonds upon request by the Treasurer of Puerto Rico, with approval of the Governor. The Joint Resolution of June 5, 1933, also previously mentioned, had the effect of superseding and making inoperative a provision in the Act of the Legislature for payment in gold, as pointed out in my opinion of June 8, 1933, to the Secretary of War concerning another issue of bonds for financing the Isabela Irrigation System.

There was transmitted with your letter a statement signed by the Treasurer of Puerto Rico, setting forth his determinations in those matters left to his discretion, and this has been approved by the Governor, as provided in the Act of the Legislature. The statement and the figures submitted by you show that the proceeds of the special assessment, mentioned in Section 2 of the 1919 statute, as amended, are insufficient in the present fiscal year to meet the principal of the bonds falling due on January 1, 1935, in addition to the other necessary payments chargeable against the proceeds of the assessment, within the contemplation of the statute, and that the entire authorized issue of $75,000 is required to meet the deficiency.

I find that all the statutory requirements regarding the issue and sale of the said bonds have been complied with

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and that the form of bond submitted is in compliance with the law and the determinations of the Treasurer, approved by the Governor. The form of bond properly recites that "under the provisions of Section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Puerto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal sub-division of any State, Territory, or possession of the United States, or by the District of Columbia."

It is therefore my opinion that the bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Puerto Rico.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

GRANTING OF LICENSE FOR THE CONSTRUCTION OF A GAS PIPE LINE

The President may grant a license for the construction and maintenance of a pipe line under the Rio Grande for transportation of gas from gas fields in Texas to Monterey, Mexico.

DEPARTMENT OF JUSTICE,
January 11, 1935.

SIR: I have your memorandum of January 4 inclosing a letter of January 3 from the Secretary of State which transmitted for your approval a form of license for the construction and maintenance of a pipe line under the Rio Grande between Roma and San Pedro for the purpose of transporting gas from the gas fields of Texas to the City of Monterey, Mexico.

It appears that the Secretary of State has handled the matter with the Secretary of War and that the latter reports that there is no objection insofar as concerns the public rights of navigation. Members of my staff have also conferred with the State Department and the War Department and have been informed that the granting of such licenses in the form submitted is common practice. I have found

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no statute relating particularly to pipe lines, but the practice in such cases appears to be based upon the principle stated in the Attorney General's opinion of January 18, 1898 (22 Op. 13, 27), that in the absence of legislative enactment the President may control the landing of submarine cables, either preventing such landing or permitting it "on conditions which will protect the interests of this Government and its citizens." I do not doubt, particularly in view of the practice which has prevailed, that the principle is as much applicable to pipe lines as to cables.

It is therefore my opinion that there is no legal objection to the granting of the proposed license. The documents submitted by you are returned herewith.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

PROCUREMENT BY WAR DEPARTMENT OF AIRCRAFT, AIRCRAFT PARTS, AND AERONAUTICAL ACCESSORIES

The act of July 2, 1926, ch. 721, 44 Stat. 780, is not exclusive in the matter of the procurement of aircraft, aircraft parts, and aeronautical accessories, and such equipment may be procured by the War Department under the provisions of prior laws relating to small scale purchases and procurements in circumstances where the exigencies do not permit delay incident to advertising for proposals, or competition is not possible.

DEPARTMENT OF JUSTICE,
January 12, 1935.

SIR: I have the honor to refer to your letter of November 20, 1934, requesting my opinion upon the following questions:

"Except in those purchases, experimental or otherwise, made under paragraphs (a) to (h), (k) and (q) of section 10 of the act of July 2, 1926, is the War Department justified in making procurement of aircraft, aircraft parts or aeronautical accessories under the provisions of section 3709, Revised Statutes (U. S. C., Title 41, Sec. 5), and/or the act of March 2, 1901 (U. S. C., Title 10, Sec. 1201)?

"If your answer to the foregoing question is in the negative, does authority exist under section 10 (t) of the act of July 2, 1926, to make purchases of aircraft, aircraft parts or

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aeronautical accessories without advertising, in cases where competition is impracticable? "

The statutory provisions mentioned are as indicated below.

Section 3709 R. S. (U. S. C., Title 41, Sec. 5):

"All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

Act of March 2, 1901, c. 803, 31 Stat. 895, 905 (U. S. C., Title 10, Sec. 1201):

" Except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the army service shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered."

The Judge Advocate General of the Army, in the opinion submitted by you, also calls attention to the following provision in the Act of June 12, 1906 c. 3078, 34 Stat. 240, 258 (U. S. C., Title 10, section 1205):

" The purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among business men, when the aggregate of the amount required does not exceed five hundred dollars; but every such purchase exceeding one hundred dollars shall be promptly reported to the Secretary of War for approval, under such regulations as he may prescribe."

Section 10 of the Act of July 2, 1926, c. 721, 44 Stat. 780, 784, directs the Secretary of War (also the Secretary of the Navy), " prior to the procurement of new designs of aircraft or aircraft parts or aeronautical accessories ", to advertise

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for the submission of such new designs in competition, and authorizes him "to contract with the winner or winners in such competition on such terms and conditions as he may deem most advantageous to the Government for furnishing or constructing" the items indicated in the advertisement. If impracticable, for reasons stated in the statute, to contract with the winner the Secretary "may retain such designs and shall advertise according to law for proposals" for furnishing or constructing such items and "make contract on such terms and conditions as he may consider the best in the Government's interests with the bidder that he shall find to be the lowest responsible bidder."

The foregoing, I think, is sufficiently illustrative of the provisions of Section 10, insofar as here pertinent, save paragraphs (k), (q) and (t), which read as follows:

"(k) The Secretary of War or the Secretary of the Navy may at his discretion purchase abroad or in the United States with or without competition, by contract, or otherwise, such designs, aircraft, aircraft parts, or aeronautical accessories as may be necessary in his judgment for experimental purposes in the development of aircraft or aircraft parts or aeronautical accessories of the best kind for the Army or the Navy, as the case may be, and if as a result of such procurement, new and suitable designs considered to be the best kind for the Army or the Navy are developed, he may enter into contract, subject to the requirements of paragraph (j) of this section, for the procurement in quantity of such aircraft, aircraft parts, or aeronautical accessories without regard to the provisions of paragraphs (a) to (e), inclusive, hereof. [Paragraph (j) provides that such contracts shall be made only with citizens of the United States, etc.; paragraphs (a) to (e), inclusive, relate to the advertising for and submission of new designs in competition.] (44 Stat. 787.)

"(q) In the procurement of aircraft constructed according to designs presented by any individual, firm, or corporation prior to the passage of this Act, which designs have been reduced to practice and found to be suitable for the purpose intended or according to such designs with minor modifications thereof, the Secretary of War or the Secretary of the Navy, when in his opinion the interests of the United States

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will be best served thereby, may contract with said individual, firm, or corporation, at reasonable prices for such quantities of said aircraft, aircraft parts, or aeronautical accessories as he may deem necessary: *Provided*, That the action of the Secretary of War or the Secretary of the Navy, in each such case shall be final and conclusive.

"(t) Hereafter whenever the Secretary of War, or the Secretary of the Navy, shall enter into a contract for or on behalf of the United States, for aircraft, aircraft parts, or aeronautical accessories, said Secretary is hereby authorized to award such contract to the bidder that said Secretary shall find to be the lowest responsible bidder that can satisfactorily perform the work or the service required to the best advantage of the Government; and the decision of the Secretary of the department concerned as to the award of such contract, the interpretation of the provisions of the contract, and the application and administration of the contract shall not be reviewable, otherwise than as may be therein provided for, by any officer or tribunal of the United States except the President and the Federal Courts."

It will thus be observed that the first several paragraphs of the Section deal with the procurement in competition of "new designs" and the making of contracts for items covered by such "new designs." Paragraph (k) authorizes purchases for "experimental purposes" and the making of contracts for supplies consequent thereupon. Paragraph (q) relates to the procurement of aircraft constructed according to designs presented prior to the passage of the Act and reduced to practice.

Each of these paragraphs introduces a factor not expressly dealt with in the preceding legislation. On the other hand, they do not cover the entire field of possible operations in the procurement of aircraft, aircraft parts, and accessories reflected by the earlier statutes. They do not provide for emergencies; they do not provide for small scale purchases in open market; and certainly there are things about an airplane which require replacement and which cannot reasonably be contemplated by the language of these paragraphs. Apparently, the truth of these general conclusions has been either asserted or tacitly assumed by all who have con-

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sidered the matter. Accepting this, accepting the further undisputed fact that the statute did not expressly repeal the earlier general legislation, and putting aside for the moment another suggestion lately made, as hereinafter indicated, the presumption is required that the earlier provisions remained effective and available to the extent that procurements made thereunder do not come within the terms of the later statute. The applicable principles are thus stated in *United States* v. *Lee Yen Tai*, 185 U. S. 213, 221:

"In the case of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that 'there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy;' and that 'if harmony is impossible, and only in that event, the former is repealed in part or wholly, as the case may be.' *Wood* v. *United States*, 16 Pet. 342 363; *United States* v. *Tynen*, 11 Wall. 88, 93; *State* v. *Stoll*, 17 Wall. 425, 431. In *Frost* v. *Wenie*, 157 U. S. 46, 58, this court said: 'It is well settled that repeals by implication are not to be favored. And when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute.'"

The Act of July 2, 1926, was, in fact, so interpreted in both the War Department and the Navy Department. Many procurements were made in accordance with such view, and payments therefor were regularly passed by the General Accounting Office, until the occurrence of the events hereafter stated.

By resolution of the House of Representatives (H. Res. 275) of March 2, 1934, (78 Cong. Rec. 3362, 3613, 3622) the

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Committee on Military Affairs began an investigation into alleged "irregularities" in the procurement of aircraft by the War Department and, in a report of June 15, 1934 (H. Rept. 2060, 73d Cong., 2d Sess.), after quoting Paragraphs (k), (q), and (t), Section 10, of the Act of July 2, 1926, made the following observations:

"The legal applications and purposes of these provisions of law as applicable to the Army were passed upon by the office of the Judge Advocate General of the United States Army by approved memoranda dated May 17, 1929, and August 3, 1929, addressed to The Assistant Secretary of War. The Judge Advocate General held that under section 10 (k) of the Air Corps Act of July 2, 1926 (supra), quantity procurement of aircraft and accessories must be made only after advertisement pursuant to section 3709 Revised Statutes.

"Subdivision 10 (t) of the Air Corps (supra) clearly defines the only method by which aircraft procurement in quantity can be obtained, that is, by competitive bidding, a policy definitely established by law not only in the Air Corps Act of 1926 but also by section 3709 of the Revised Statutes, March 2, 1861, and the act of March 2, 1901.

"In addition to illegal procurement of aircraft and accessories under the provisions of (k) and (q) of the Air Corps Act of 1926, procurement was illegally made by an alleged compliance with Army regulations (par. 9 A. R. 5–160).

"Further unlawful procurement was made allegedly in compliance with Army Regulations 5–240, 1–2, dated October 1, 1932, which reads, in part, as follows:

"'Without competition, general authorization: Supplies may be procured without competition only when it is impracticable to secure competition or when purchase without competition is expressly authorized by statutes.'

"Despite the provisions of the Air Corps Act of 1926 and the interpretations thereof by The Judge Advocate General the evidence discloses deliberate, willful, and intentional violations of law by the Chief of the Air Corps, aided and abetted by his assistants in charge of procurement.

"As a result of continued violations of provisions of the Air Corps Act of 1926 and various subterfuges which were begun immediately following the passage of the act and con-

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tinually used by the Procurement Division of the Air Corps to evade the clear intent and purpose of the act in regard to the procurement of aircraft in quantity, there has developed a pernicious, unlawful system detrimental to the progress of the Air Corps of the United States and to the adequacy of our national air defense. This system has resulted in favoritism and discrimination, which section 3709 of the Revised Statutes and section 10 (t) of the Air Corps Act sought to eradicate by prescribing competitive bidding in the Army Air Corps."

The Committee's view of the law is not controlling but is, of course, entitled to respectful consideration, and it is noteworthy that it approved and adopted the view theretofore prevailing that the Act of July 2, 1926, was not exclusive in the matter of aircraft procurements. Section 3709 R. S., which it thought also governed, provided for advertising for proposals save "when immediate delivery or performance is required by the public exigency."

If Section 3709 R. S. was preserved there is no reason in law for a contrary holding respecting the provisions for small scale purchases, and purchases when competition is impossible or highly impracticable. Even aside from express statutory exceptions, Section 3709 R. S. has long since been interpreted as applying only "where competition * * * is possible," as indicated in the following excerpt from Attorney General MacVeagh's opinion of May 13, 1881 (17 Op. 84, 86):

"The design of this section, in requiring advertisement for proposals before making purchases and contracts for supplies, is to invite competition among bidders, and it contemplates only those purchases and contracts where competition as to the article needed is possible. The Official Postal Guide being a copyrighted publication, edited, printed, and owned by a particular firm, it is manifestly not an article for the furnishing of which there could be any competition between that firm and other persons."

To advertise for bids for a replacement needed for a military airplane on the eve of an actual engagement or in some other real exigency would, of course, be unthinkable. To advertise for proposals for supplying a patented article

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which alone would do and which it was known could be obtained from a single source, might be less tragic in consequences but hardly less irrational. The established rules forbid acceptance of a construction with any such effect if another and more reasonable one is possible.

Competence and honesty of purpose are, of course, prerequisite to the proper administrative application of such provisions. If there is no actual exigency and one is merely conjectured, or if an actual exigency requires immediate delivery of only one article and yet a thousand are bought, there is, at least, a probable abuse of discretion. If an article is required which might reasonably be obtained from several sources and the specifications therefore are so narrowed, without reasonable relation to actual needs of the service, as to limit possible procurement to a single source, this also is an abuse of discretion. If wrongful intent is present, we may, in the words of the Committee, term such things "subterfuges" and "violations."

I am not aware of the facts in the cases to which the Committee referred and do not intend herein to express any opinion concerning them. I feel confident, however, that the Committee had in mind considerations such as those mentioned in the preceding paragraph and did not intend to suggest that the statutes prior to that of July 2, 1926, and the general principle stated in Attorney General MacVeagh's opinion, *supra*, may not be availed of in proper cases.

After the question of the alleged irregularities was brought up in the House of Representatives the Comptroller General, reversing his previous position (evidenced by his passing of accounts in connection with prior purchases), made the following ruling in a letter of May 22, 1934, addressed to the Secretary of War:

"Section 10 (t) of the act of July 2, 1926, specifically provides that quantity purchases of airplanes shall be made from the lowest responsible bidder that the Secretary of War shall find can satisfactorily perform the work or the service required to the best advantage of the Government, and in the drafting of the specifications there is for consideration the designs which the United States is supposed to have acquired under the preceding subsections of section 10 of the act of

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July 2, 1926. There is no authority in the act of July 2, 1926, for the quantity purchase of airplanes without advertising; that is, for proprietary quantity purchases of airplanes. The act of July 2, 1926, is exclusive in the matter of airplane purchases, and the authority does not exist thereunder to make proprietary quantity purchases of airplanes, nor is there available for such purchases in any case the authority under Section 3709, Revised Statutes, to make contracts without advertising in proper cases where the facts are such as to show that no product of other than a particular manufacturer will meet the needs of the United States."

He later stated that the rule thus enunciated would be "strictly applied with respect to purchases on and after that date" (May 22, 1934).

Subsequently, in a letter of October 2, 1934, to the Secretary of the Navy concerning the application of the rule to purchases without competition "on the ground that a particular manufacturer is solely or peculiarly in a position to manufacture or furnish the particular type or design of aircraft, engines, spare parts or equipment required," the Comptroller General made the following statements:

"There can be no doubt as to the propriety of this requirement with respect to purchase of 'aircraft' and your question goes to the need for inclusion of 'engines, spare parts or equipment' * * *.

"Where the provisions of the act of July 2, 1926, have been fully observed in the matters of development and quantity purchase of aircraft there has presumably been acquired a balanced product and in such circumstances it would seem not only unnecessary but unwise in connection with procurement of parts needed for repairs and replacements to require purchases that when employed would destroy such balance or otherwise endanger the whole.

"As to such aircraft the need in obtaining parts for repairs and replacements involves maintaining in all essential respects the original design so developed and determined to be best for the use intended and nothing less than such need is required to be accepted. In such connection a need shown to be emergent in character—due to accident or other unanticipated occurrence—and where conditions will not permit of delay purchase of necessary duplicate parts

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without competition need not be objected to. As to like needs where no true emergency is involved the law contemplates competition, not necessarily wide publicity, but all actual competition the industry affords—to the end that all in a position to supply the need may be given opportunity to bid, and that the Government may have the advantage of the lowest offer. Any other procedure would not only affront the law but would leave room for question whether the public interest had been fully protected. The safe and lawful method of protecting the public interest in such matters is to encourage bidding by all those who believe they can serve the need, with acceptance of the low bid. It is believed your department will have no difficulty in so establishing when a low bidder proffers less than the actual need."

In a letter to the Secretary of War under date of July 31, 1934, explaining the apparent change of position represented by his opinion of May 22, 1934, the Comptroller General indicated that the question had not previously been brought to attention for specific ruling.

The first mentioned opinion dealt with a "quantity procurement of airplanes" (111 planes), under a contract executed prior to your assumption of the office of Secretary of War, without advertising, upon the ground that only the product of the contractor would meet the requirements of the Army. I am not dealing with that question. The language of the Act of July 2, 1926, indicates an apparent view that under its provisions, the Army and the Navy would set about to develop types of planes that would combine the best features gleaned from new designs submitted in competition, experimental purchases, etc. Whether, in the meantime or in the event of failure to achieve such an end, there is power, not only to select a particular proprietary plane, but to purchase it in quantities without advertising, I reserve for future consideration if, and when, occasion shall arise. I understand that you are not presently contemplating the purchase of airplanes in quantities without advertising.

Paragraph (t), which the Comptroller General mentions, provides that "whenever the Secretary * * * shall enter into a contract" he may award it to "the lowest responsible bidder" and that his acts with respect thereto "shall not be reviewable * * * by any officer or tribunal of the

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United States except the President and the Federal Courts." It does not, alone, supply substantive authority for any purchases or any contracts. Its reference to awards to bidders is understandable and complete only when read in connection with provisions of the same and other statutes requiring advertising for proposals. To conclude that it requires advertising in connection with *all* contracts would make it conflict with other provisions even of the statute in which it is contained. It describes, but does not independently provide, the ordinary manner of procurement. This, I think, is what is contemplated in the references to the paragraph in both the opinion of the Comptroller General and the Report of the Committee on Military Affairs, and this view alone is consistent with their other statements and conclusions.

In his letter of October 2, 1934, to the Secretary of the Navy, the Comptroller General dealt with "engines, spare parts or equipment" and held that they might be purchased in emergencies without advertising, thus coinciding with the view of the Committee that the Act of July 2, 1926, is to be read in connection with Section 3709 R. S., which, as hereinbefore pointed out, requires advertising for bids only when the public exigencies do not require immediate delivery or performance. In this I fully agree with the Comptroller General.

There is also another exception, implied in Section 3709 R. S. and specifically stated in the Act of March 2, 1901, concerning cases in which it is impossible or impracticable to secure competition. The Act of July 2, 1926, does not change this, and it is as true today as it was a half century ago that advertising for bids is not required in cases where competition cannot be had. An officer might abuse his discretion in so limiting his requirements, without regard to actual needs, that only a single manufacturer could supply them, but it has long since been recognized that mere advertising for bids would not correct this; it might, in fact, make matters worse because of the additional and unnecessary expense of the purposeless advertising.

For like reasons, and further applying the rule stated by the Supreme Court in *United States* v. *Lee Yen Tai*, *supra*, since the Act of July 2, 1926, did not provide for small scale purchases, did not repeal the earlier legislation making pro-

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vision therefor, and presents no repugnancy thereto, the conclusion is required that the earlier legislation has remained effective and available for small scale purchases which come within its terms and do not come within particular provisions of the later Act.

In fine, the provisions of the law existing when the Act of July 2, 1926, was passed remained effective, with the meaning theretofore attributed to them, save as expressly superseded or modified by, or clearly repugnant to, the later Act. The language of the statute requires this conclusion, particularly when it is read in the light of the principles laid down by the Supreme Court. If, however, I doubted this as an original proposition, it would, under other principles equally well settled, require a strong case indeed to justify a departure from nearly nine years of administrative practice, supported by opinions of the Judge Advocates General of both the Army and Navy, the conclusion of the House Committee on Military Affairs, the long practice of the General Accounting Office in passing accounts, and the conclusions finally expressed by the Comptroller General—which latter, of course, do not specifically deal with all the phases herein considered but do clearly support the view that the Act of July 2, 1926, is not exclusive.

Considering the foregoing, it is my opinion that, except in connection with purchases clearly provided for by the Act of July 2, 1926, interpreted as hereinbefore indicated, the War Department is authorized to make procurements of aircraft, aircraft parts and aeronautical accessories under the provisions of law, previously enacted, relating to small scale purchases and procurements in circumstances where the exigencies do not permit of delay incident to advertising for proposals or competition is not possible. These, however, are but limited exceptions to the general rule evidenced by all the statutes that procurements are ordinarily to be made after advertising in the manner prescribed by law, and close circumspection, as well as the utmost good faith, is required when resorting to them in order that the spirit no less than the letter of the law shall prevail.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

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CONSTRUCTION OF STATUTE TO BE ACCEPTED BY THE SECRETARY OF THE NAVY IN CASE OF CONFLICT BETWEEN OPINION OF THE ATTORNEY GENERAL AND DECISIONS OF THE COURT OF CLAIMS ON THE ONE HAND AND DECISIONS OF THE COMPTROLLER GENERAL ON THE OTHER

The Attorney General in an opinion to the Secretary of the Navy, and the Court of Claims in *Bullard* v. *United States*, 66 Ct. Cls. 264, and numerous subsequent decisions, have held that an officer detached from duty and ordered to his home to await further orders has been ordered to make a permanent change of station within the meaning of Section 12 of the Act of May 18, 1920, 41 Stat. 604; and under the Court of Claims decisions, which the Department of Justice has determined should not be appealed, it is immaterial whether the station from which the officer is ordered is *within* or *without* the United States. The Comptroller General has held, on the contrary, that no permanent change of station is involved in case the officer is ordered from a station *within* the United States, and he has refused to accept the Court of Claims decisions as binding upon his office in such cases.

***Held*, the Secretary of the Navy should accept the opinion of the Attorney General and the decisions of the Court of Claims as controlling in the administration of the statute, and should instruct his subordinates accordingly.**

***Held, further*, the Comptroller General is bound as a matter of law by the construction placed upon the statute by the Attorney General and the Court of Claims.**

DEPARTMENT OF JUSTICE,
January 15, 1935.

SIR: Reference is made to your letter of May 22, 1934, in which you request my opinion upon certain questions arising in your Department in connection with the administration of section 12 of the Act of May 18, 1920, 41 Stat. 604, as amended by section 12 of the Act of June 10, 1922, 42 Stat. 631, and to your letter of November 20, 1934, in which you furnish further information relative to the matter as requested in my letter of July 11, 1934.

The sections referred to, insofar as here material, are as follows:

"That hereafter when any commissioned officer, noncommissioned officer of the grade of color sergeant and above, including any noncommissioned officer of the Marine Corps of corresponding grade, warrant officer, chief petty

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officer, or petty officer (first class), having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall furnish transportation in kind from funds appropriated for the transportation of the Army, the Navy, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, and the Public Health Service to his new station for the wife and dependent child or children: *Provided*, That for persons in the naval service the term 'permanent station', as used in this section, shall be interpreted to mean a shore station or the home yard of the vessel to which the person concerned may be ordered; and a duly authorized change in home yard or home port of such vessel shall be deemed a change of station: * * *"

* * * * *

"* * * In lieu of the transportation in kind authorized by section 12 of an Act entitled 'An Act to increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service,' approved May 18, 1920, to be furnished by the United States for dependents, the President may authorize the payment in money of amounts equal to such commercial transportation costs when such travel shall have been completed. * * *"

You point out that Attorney General Stone held in his opinion of December 24, 1924, to the Secretary of the Navy, (34 Op. 346), that an officer detached from duty and ordered to his home to await further orders has been ordered to make a permanent change of station within the meaning of that act, and that the Court of Claims has so construed the act in *Bullard* v. *United States*, 66 Ct. Cls. 264, and *Henry* v. *United States*, 74 Ct. Cls. 527, and various other cases. You further point out that under the Court of Claims decisions it is immaterial whether the station from which the officer is ordered to his home to await orders is *within* or *without* the continental limits of the United States, but that the Comptroller General of the United States differentiates between the two kinds of cases and refuses to accept the Court of Claims decisions as binding upon his office as to those cases in which the officer is ordered to his home from a station *within* the United States (Decisions of the Comp-

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troller General A-25746 of January 30, 1929, and A-44741 of October 3, 1932).

You state that in view of the conflict in decision between the Comptroller General on the one hand and the Attorney General and the Court of Claims on the other, you are in doubt as to what instructions should be given the disbursing officers of your Department relative to the matter of payment of claims submitted under the statute, and you request my opinion upon the following questions:

"Is the Comptroller General's decision, under the circumstances stated, to be accepted as controlling on the executive branch of the Government, or is it my duty to require my subordinates to follow the law as construed by the Attorney General and the Court of Claims? Or is the question thus presented one which should be brought to the attention of the President for consideration in the exercise of his constitutional duty to 'take care that the laws be faithfully executed'"?

The opinion of the Attorney General referred to by you was cited with approval and followed by the Court of Claims in the *Bullard* case, *supra*, which was decided October 15, 1928. Since that time the Court of Claims has decided numerous similar cases and has uniformly held in favor of the claimant officers. Such cases include *Henry* v. *United States*, 74 Ct. Cls. 527; *Russell* v. *United States* (No. 42367), decided January 8, 1934; *Tanske* v. *United States* (No. 42445), decided March 5, 1934; *Baylis* v. *United States* (No. 42327), decided May 7, 1934; *Greene* v. *United States* (No. 42340) and *Toaz* v. *United States* (No. 42537), decided December 3, 1934; and the following cases decided November 5, 1934: *Chadbourne* v. *United States* (No. 43,238), *Washington* v. *United States* (No. 42347), *Alfred* v. *United States* (No. 43256), *Cooper* v. *United States* (No. 42339), and *Franz* v. *United States* (No. M-150). In all of these cases the Court cites the *Bullard* case in support of its holding.

In all of these cases the plaintiff officer was ordered to his home from a station within the continental limits of the United States. As pointed out by you, the Court of Claims does not distinguish between such cases and the original *Bullard case* in which the officer was ordered to his home from a station outside the continental limits of the United

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States. It is plain, also, that there is no real basis for such a distinction.

This Department, acting within the scope of its authority and in the proper exercise of its functions, has determined in each of the enumerated cases that no appeal should be taken from the Court of Claims decision, and the construction placed upon the statute by the Court of Claims is considered by this Department to be correct. Since there is no conflict of judicial decision upon this question, and since no appeal has been taken or will be taken from the Court of Claims decisions, the law must be considered as settled by such decisions, and, as so construed, binding upon all executive branches of the Government, including the office of the Comptroller General.

Accordingly, I must advise you that you should accept the above-cited opinion of the Attorney General and decisions of the Court of Claims as controlling in the administration of the statute and instruct your subordinates accordingly.

As above suggested, the Comptroller General, who is clearly an administrative officer of the Government, is likewise bound as a matter of law by the construction placed upon the statute by the Attorney General and the Court of Claims.

In *Smith* v. *Jackson*, 241 Fed. 747, 246 U. S. 388, the Auditor of the Panama Canal, whose duty it was to pay the salary of the judge for the District Court for the Canal Zone, withheld in paying such salary certain sums that he considered due from the judge as rent for quarters furnished by the Government and because of the absence of the judge from the Canal Zone during a certain period. The judge thereupon sued in the District Court for the Canal Zone for writ of mandamus to compel the Auditor to pay him the sums so withheld. The Court held that the deductions were made without authority of law and issued the writ of mandamus prayed for. This judgment was affirmed by the Circuit Court of Appeals whose judgment was in turn affirmed by the Supreme Court of the United States.

Prior to suit the Attorney General was requested by the Auditor, and also by the Governor of the Panama Canal, to render an opinion as to the authority of the Auditor to make the deductions in question. The Attorney General

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held that the question involved was one for judicial rather than administrative determination and that the alleged claim against the judge could be enforced only through proceedings in the courts. With this view all three of the courts hearing the case agreed. Relative to the force and legal effect of an opinion of the Attorney General (as to administrative officers), the District Court, whose opinion is in effect adopted by the Circuit Court of Appeals, quotes with approval the following excerpt from the opinion of Attorney General Olney rendered to the Secretary of the Treasury February 12, 1894 (20 Op. 719, 722):

"The act of 1870, section 4, establishing the Department of Justice, provided that written opinions prepared by a subordinate in the department may be approved by the Attorney General, and that 'such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney General.' This provision is embraced in substantially the same language in section 358 of the Revised Statutes. Evidently, therefore, Congress contemplates that the official opinions signed or indorsed in writing by the Attorney General shall have some actual and practical force. Congress' intention cannot be doubted that administrative officers should regard them as law until withdrawn by the Attorney General or overruled by the courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the Department of Justice."

And relative to this point the Supreme Court, in affirming the judgment of the Circuit Court of Appeals, states (p. 390–391):

"* * * we are of opinion that it is obvious on the face of the statement of the case that the Auditor had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General, and second, beyond all possible question to the judgments of the courts below."

Miguel v. *McCarl*, 291 U. S. 442, is also in point. In that case, which involved the construction of an act of Congress, the Comptroller General had held in an advance decision that a certain claim of the plaintiff against the Government was invalid and that the disbursing officer to whom the

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voucher covering the claim was presented for payment had no authority to pay the claim. The Supreme Court held, however, that it was the plain duty of the disbursing officer to pay the claim and that that duty could not be affected by a contrary decision of the Comptroller General.

If the Comptroller General should refuse to allow payments made by your disbursing officers of claims valid under the Court of Claims decisions, or otherwise embarrass your Department in the proper administration of the statute, there would then arise the question as to whether the situation thus presented should be brought to the attention of the President for consideration under his Constitutional duty to "take care that the laws be faithfully executed." However, that is purely a question of policy as to which it would not be proper for me to advise you (17 Op. 332), but which would be for your determination as an administrative matter.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE NAVY.

JURISDICTION OF THE SECRETARY OF WAR AND THE COMPTROLLER GENERAL IN CONNECTION WITH THE ADJUDICATION OF CLAIMS FOR LOST PROPERTY ARISING UNDER THE ACT OF MARCH 4, 1921, 41 STAT. 1437

The Comptroller General is without authority to review the findings of fact made by the Secretary of War in the adjudication of claims arising under the act of March 4, 1921, 41 Stat. 1437, providing that the personnel of the Army shall be entitled to replacement or compensation in damages for personal property lost or damaged under certain circumstances. However, the conclusion of the Secretary of War as to whether a particular claim under the facts found comes within the act, is not binding on the Comptroller General, and the latter may review such claim to determine whether payment thereof is authorized by the statute, his determination being subject to review by the Court of Claims and, in a proper case, by the Attorney General.

The question whether the Secretary of War would be legally justified in ordering the disbursing officer of the Army to make payment of a claim approved by the Secretary of War but previously disallowed by the Comptroller General, involves a matter of policy as to which it would not be proper for the Attorney General to advise the Secretary of War.

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DEPARTMENT OF JUSTICE,
January 26, 1935.

SIR: I have your letter of November 14, 1934, in which you request my opinion as to whether the Comptroller General is authorized to review your findings as to either the law or the facts in the adjudication of claims under the Act of March 4, 1921, c. 163, 41 Stat 1437 (U. S. C., Title 31, Secs. 218–222), and, if not, whether you would be legally justified in ordering a disbursing officer of the Army to make payment of a claim heretofore approved by you, notwithstanding that the Comptroller General had previously disallowed such claim.

The Act in question provides that the personnel of the Army shall be entitled to replacement or compensation in damages for personal property lost or damaged under certain circumstances prescribed therein, and contains the following pertinent provisions:

"SEC. 3. That the Secretary of War is authorized and directed to examine into, ascertain, and determine the value of such property lost, destroyed, captured, or abandoned as specified in the foregoing paragraphs, or the amount of damage thereto, as the case may be; and the amount of such value or damage so ascertained and determined shall be paid by disbursing officers of the Army, or such property lost, destroyed, captured, or abandoned, or so damaged as to be unfit for service, may be replaced in kind from Government property on hand when the Secretary of War shall so direct.

"SEC. 4. That the tender of replacement or of commutation or the determination made by the Secretary of War upon a claim presented, as provided for in the foregoing section, shall constitute a final determination of any claim cognizable under this chapter, and such claim shall not thereafter be reopened or considered."

It appears from your letter that the Comptroller General advised the Secretary of War under date of September 29, 1921, that the adjudication of claims arising under this act was for the Secretary of War and that the only duty devolving upon the accounting officers in respect thereto was "to see that the claim made and the evidence have relation to each other, and particularly so that there may be no collusion or fraud." You state that notwithstanding his deci-

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sion in the matter the Comptroller General has in several instances disallowed claims arising under the statute in question after they had been adjudicated by the Secretary of War, thus assuming the authority to review the War Department's action in the premises both as to findings of fact and conclusions of law. In this connection you further state that there are now pending in the War Department several claims arising under this law which have been allowed by the Secretary of War, but payment of which has been suspended for the reason that the Comptroller General has refused to approve the settlement upon the ground that either the evidence in his opinion does not warrant the findings of fact reached by the Secretary of War, or the claim is not covered by the statute.

The act clearly places the duty to determine all questions of fact in connection with claims arising thereunder in the Secretary of War, and his action in this respect is not reviewable by any other executive officer of the Government. (See Opinion of Acting Attorney General to the Secretary of War dated August 8, 1933, 37 Op. 219; also 37 Op. 95–100, 101; 34 id. 162, 170, 171.) When the Secretary has examined into and determined the amount due a claimant on account of loss or damage to personal property, the act provides that "the amount of such value or damages so ascertained and determined shall be paid by disbursing officers of the Army." In this connection the duty of the disbursing officer to pay the amount stated "is so plainly prescribed as to be free from doubt and equivalent to a positive command" and, therefore, is "so far ministerial that its performance may be compelled by mandamus." Furthermore, this duty cannot be affected by a contrary decision of the Comptroller General. *Miguel* v. *McCarl*, 291 U. S. 442, 454; *McCarl* v. *Cox*, 56 App. D. C. 27 (certiorari denied, 270 U. S. 652).

The Act does not, however, make the Secretary's conclusion of law as to whether a particular claim under the facts found is covered by the provisions of the act binding on other executive officers of the Government or the Court of Claims. This question was decided by the Court of Claims in *Curren* v. *United States*, 65 Ct. Cls. 26, 32. In that case the Secretary found that the damage occurred while the property was in storage during the absence of its owner on

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foreign service and held that "circumstances of this loss come within the intent and meaning of the phrase 'or, while at the time of such loss claimant was engaged in authorized military duties in connection therewith.'"

The Comptroller General disallowed the Secretary's award and claimant brought action in the Court of Claims. The court held that the loss did not cover loss of, or damage to, property in storage, and for that reason claimant could not recover. Upon the question of the jurisdiction of the Secretary of War in the premises, the court said:

"The determination of the Secretary of War of a claim presented under the act of 1921 is final and conclusive only when such determination is authoritatively made. The court has before it precisely the same facts upon which the Secretary of War based his conclusion of law, and under those facts the court is of the opinion that in construing the statutes to cover the loss in question the conclusion of the Secretary of War was clearly erroneous."

It seems therefore that in the final adjustment and settlement of claims against the United States, which the Comptroller General is authorized under the law to make, he may disallow a claim if in his opinion the Secretary of War was in error in construing the statute to cover loss or damage in a particular case. In such case the claimant has his remedy in the Court of Claims.

In view of the foregoing it is my opinion that the Comptroller General has no authority to ignore or reject the findings of fact in respect to a claim which has been determined and approved by the Secretary of War, but that he does have authority to review such claim to determine whether its payment is authorized by the statute, his determination being, of course, subject to review by the Court of Claims and, in a proper case, by the Attorney General. Your second question relates to a matter of policy as to which it would not be proper for me to advise you (17 Op. 332) and is for your administrative determination in accordance with this opinion.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

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JURISDICTION OF THE UNITED STATES OVER THE SITES OF THE NAVAL AIR STATIONS AT LAKEHURST AND CAPE MAY, N. J.

The sites of the Naval Air Stations at Lakehurst and Cape May, N. J., were acquired by the United States with the consent of the State of New Jersey; and the United States has thus acquired exclusive jurisdiction over such sites as provided in Article I, Section 8, Clause 17 of the Constitution.

DEPARTMENT OF JUSTICE,
January 30, 1935.

SIR: I am in receipt of your letter of January 23, 1935, requesting my opinion as to the extent of the jurisdiction of the United States over the sites of the Naval Air Station, Lakehurst, New Jersey, and the Naval Air Station, Cape May, New Jersey.

It appears from the memorandum opinion of the Judge Advocate General of your Department, dated January 23, 1935, that the site of the Naval Air Station, Lakehurst, New Jersey, containing an area of 1450 acres, more or less, was acquired by purchase in 1926 and 1929, and that the site of the Naval Air Station, Cape May, New Jersey, was taken over by the President by Proclamation dated December 2, 1918 (40 Stat. Pt. II, 1912) on behalf of the United States pursuant to the Act of Congress approved October 6, 1917 (40 Stat. 344).

Since the acquisition of these two tracts your Department has asserted the exclusive jurisdiction of the United States over the areas involved. The determination as to the right to exercise exclusive jurisdiction depends upon whether or not these tracts were acquired with the consent of the State of New Jersey and, upon such acquisition, came within the provisions of Article I, Section 8, Clause 17 of the Constitution of the United States.

Article I, Section 8, Clause 17 of the Constitution grants exclusive jurisdiction by this language:

"To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places pur-

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chased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; * * *"

Inasmuch as Naval Air Stations are not specifically named in the constitutional provision, the question is whether the erection of the necessary buildings and works for such purposes may be said to come within the term "other needful building."

The pertinent Act of cession of the State of New Jersey in force at the time of the acquisition of these lands was the Act of March 29, 1907 (c. 19, Session Laws of New Jersey (1907), p. 43), entitled, "An Act ceding to the United States jurisdiction over lands acquired for public purposes within this State." Section 1 reads:

"The consent of the State of New Jersey is hereby given, pursuant to the provisions of article one, section eight, paragraph seventeen, of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land within this State, for the erection of dock-yards, custom houses, court houses or post offices or other needful buildings."

Section 2 provides in part:

"Exclusive jurisdiction in and over any land so acquired by the United States is hereby ceded to the United States for all purposes except the service of process * * *"

While the designation of particular governmental works is not precisely the same as in the Constitution, yet the use of the term "other needful buildings" must be construed to evidence the intention of the State to give jurisdiction to the United States for any governmental project needed for public use within the State. In view of the broad language of the title to the Act, the "other needful buildings" should not be construed as referring to the same class as those specifically named. The term "other needful buildings" used in the constitutional provision and in the Acts of cession of the various States has been given liberal interpretation by the courts and has been defined as the buildings or works necessary for governmental purposes and has not been limited to the class specifically designated in the constitutional provision or in the statutes.

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In the case of *United States* v. *Tucker*, 122 Fed. 518, the court said (p. 522):

"While there might possibly be some difficulty (under the rule ejusdem generis) if the question were res integra, as to the strictly proper construction and applicability to the case of locks and dams of the words, 'for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings,' used in the clause of the Constitution above quoted, the cases seem to leave no doubt that the broadest construction has been wisely put upon that language—one which makes it cover all structures and all places necessary for carrying on the business of the national government."

The court construed the provision in the case of *United States* v. *Wurtzbarger*, 276 Fed. 753, using this language (p. 755):

"It has been the policy of the general government for many years to establish and maintain training schools and educational institutions for the Indians, who are the wards of the Government, and for such purposes it has acquired lands, with appurtenances, upon which to maintain such institutions, and it seems indisputable that they come within the category of 'other needful buildings,' the language of the clause of the Constitution under discussion."

State Courts also have adopted this liberal view, as evidenced by the following excerpt from the opinion of the Supreme Court of Tennessee in *State ex rel. Lyle* v. *Willett*, 117 Tenn. 334, 341:

"We think the power to purchase a place for a Soldier's Home was within the intent and meaning of the section quoted, and falls directly under the clause 'and other needful buildings.' As said in the *Ohio* case referred to, such institutions are erected by the Government, under its war power, since the wounding and disablement of its soldiers are a necessary incident of war, and it is as proper an exercise of the functions of government to care for such persons, after they have been disabled, as to enlist them and place them in line of duty in the service of the country where such results will necessarily follow."

The United States District Court for the District of New Jersey, in *United States* v. *Mayor and Council of City of*

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Hoboken, 29 F. (2d) 935, 942, found no merit in the contention made in that case that the New Jersey statute did not evidence consent to the acquisition by the United States of a steamship pier.

Considering the foregoing, it is my opinion that the State of New Jersey has consented to the acquisition by the United States of the sites of the Naval Air Stations at Lakehurst and Cape May, New Jersey, and that the United States has thereby acquired exclusive jurisdiction over such sites, as provided in the Constitution (Art. I, Sec. 8, Cl. 17).

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE NAVY.

REMISSION OR MITIGATION OF FINES, PENALTIES, AND FORFEITURES IN CONNECTION WITH THE SALE OF A VESSEL IN VIOLATION OF SECTION 9 OF THE SHIPPING ACT, 1916, AS AMENDED

The Secretary of Commerce has authority to remit or mitigate the forfeiture of a vessel provided for in section 9 of the Shipping Act, 1916, as amended. The Secretary does not have authority to exercise the power of remission or mitigation with respect to the fine provided for the misdemeanor declared by the statute, unless and until the fine is imposed.

DEPARTMENT OF JUSTICE,
January 30, 1935.

SIR: I have your letter of January 8, from which it appears that a yacht, documented under the navigation laws of the United States, was sold through a broker to a citizen of a foreign country without the approval of the Secretary of Commerce. It is stated, however, that the former owners relied upon the broker to conform to all necessary requirements and did not knowingly or intentionally violate the law.

The following provisions are applicable:

U. S. C., Title 46, section 808: "It shall be unlawful to sell, transfer or mortgage, or, except under regulations prescribed by the board, to charter, any vessel purchased from the board or documented under the laws of the United States

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to any person not a citizen of the United States, or to put the same under a foreign registry or flag, without first obtaining the board's approval.

"Any vessel chartered, sold, transferred or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both. (Sept. 7, 1916, c. 451, Sec. 9, 39 Stat. 730; July 15, 1918, c. 152, Sec. 3, 40 Stat. 900; June 5, 1920, c. 250, Sec. 18, 41 Stat. 994.)"

U. S. C., Title 18, section 642: "The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture provided for in laws relating to vessels or discontinue any prosecution to recover penalties or relating to forfeitures denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's powers of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty or forfeiture; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper. (R. S. Sec. 5294; Dec. 15, 1894, c. 7, 28 Stat. 595; Mar. 2, 1896, c. 37, 29 Stat. 39.)"

U. S. C., Title 5, section 600: "All duties, power, authority and jurisdiction, whether supervisory, appellate, or otherwise, formerly imposed or conferred upon the Secretary of the Treasury by acts of Congress relating to merchant vessels or yachts, their measurement, numbers, names, registers, enrollments, licenses, commissions, records, mortgages, bills of sale, transfers, * * * are transferred to and imposed and conferred upon the Secretary of Commerce from and after the time of the transfer of the Bureau of Navigation, the Shipping Commissioners and the Steamboat Inspection

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Service to the Department of Commerce. (Feb. 14, 1903, c. 552, Sec. 10, 32 Stat. 829.)"

Executive Order, June 10, 1933: "The functions of the United States Shipping Board, including those over and in respect to the United States Shipping Board Merchant Fleet Corporation, are transferred to the Department of Commerce, and the United States Shipping Board is abolished."

The matter has been referred to you by the Director of the United States Shipping Board Bureau with the following recommendations:

"In view of the foregoing it is recommended that the power of the Secretary of Commerce to remit or mitigate fines and penalties for violations of Sections 9 and 41 of the Shipping Act, 1916, as amended, be exercised in this instance, and that there be a remission of the forfeiture of the vessel and mitigation of the personal fines provided by Section 9 be made if the sum of $200.00 be paid by the former owners and/or their agent and/or anyone on their behalf.

"It is further recommended that the files in this case be not referred to the Attorney General for his consideration and action as he may deem appropriate with reference to the imprisonment provisions of the law for the reason that the facts developed indicate that the violation was without any wilful intent on the part of the owners, and the violation seems to fall clearly within that class of cases in which the Attorney General heretofore has decided the facts did not warrant prosecution."

You state that you are disposed to take favorable action upon the recommendation of the Director, and request my opinion upon the following questions:

"(1) Whether Section 5294 R. S., supra, authorizing the Secretary of Commerce to remit or mitigate fines, penalties or forfeitures in certain cases would apply to the forfeiture of the vessel provided for in Section 9 of the Shipping Act as amended:

"(2) Whether the authority contained in said Section 5294 would also apply to the fine provided in said Section 9 of the Shipping Act, as amended, for a violation thereof

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denounced therein as a misdemeanor and punishable by fine or imprisonment."

The above quoted provisions of the Act of September 7, 1916, as amended, are "laws relating to vessels," within the meaning of Section 5294 R. S., as amended. Furthermore, by the Act of February 14, 1903, and the Executive Order of June 10, 1933, the power to approve a sale, and the power to remit or mitigate fines, penalties and forfeitures incurred in connection with such a sale, are now vested in the Department of Commerce. (35 Op. 81.) I therefore concur in the views expressed in the Legal Division of the Shipping Board Bureau and by the Solicitor of your Department that you are authorized to remit or mitigate the forfeiture of the vessel.

In addition to imposing the forfeiture, the statute makes the act of the parties a misdemeanor, punishable by fine or imprisonment, or both. It is beyond question that no action by you could affect the possible penalty of imprisonment because this is expressly excepted in Section 5294 R. S.

As to your power to remit or mitigate the fine authorized to be imposed upon conviction for the misdemeanor, concerning which your Solicitor expresses doubt, a question arises whether there can be any such thing as remission or mitigation of a fine which has not yet been imposed, and may never be imposed, dependent upon factors wholly beyond your control. If you could mitigate a possible fine in this manner, nevertheless it could not be said that the crime had been expiated without prosecution and judicial determination of the mete punishment, which might be, or include, imprisonment. Your Solicitor states that it has been long practice in your Department not to remit or mitigate fines in penal cases, and I am satisfied that this practice correctly reflects the law, at least insofar as it bears upon the only phase now before me. I therefore conclude that you are not authorized to exercise the power of remission or mitigation with respect to the fine for the misdemeanor, authorized by the statute but not imposed.

Of course, it is not the purpose of this Department to prosecute criminally in every case of minor and unintentional violation of a federal statute. In a somewhat simi-

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lar situation, Attorney General Cushing stated (7 Op. 489), "the case appears to justify abstinence from prosecution of the master, leaving the question of remission of the penalties to be disposed of as usual by the Secretary of the Treasury." I have no power to agree that there will be no prosecution, but I do have the power, and am charged with the duty, to determine whether or not prosecution is warranted; and in such connection I am always glad to have your recommendation in cases arising in your Department and to consider, for whatever bearing it may have, any other penalty already imposed or contemplated for the same offense. Your file is returned herewith.

Respectfully,

HOMER CUMMINGS.

Incl. 392650.

To the SECRETARY OF COMMERCE.

APPLICATION OF MINING LAWS TO LANDS WITHIN THE WICHITA FOREST RESERVE

Lands within the areas added to the Wichita Forest Reserve after the date of the proclamation creating the Wichita National Game Reserve in the Forest Reserve are as to their mineral resources subject to entry, location, and development under the United States mining laws.

DEPARTMENT OF JUSTICE,
February 5, 1935.

SIR: Reference is made to your letter of January 5, 1935, in which you request my opinion as to whether lands added to the Wichita Forest Reserve in Oklahoma after the creation of the Wichita National Game Reserve are subject to location and purchase under the United States mining laws.

The Wichita Forest Reserve was created by Presidential Proclamation of July 4, 1901, 32 Stat. 1973. Authority for its creation is contained in section 24 of the Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1103, which provides that the President may, from time to time, set apart and reserve any part of the public lands as public reservations, and by public Proclamation declare the establishment of such reservations and the limits thereof.

The Act of January 24, 1905, ch. 137, 33 Stat. 614, authorized the President "to designate such areas in the Wichita

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Forest Reserve as should, in his opinion, be set aside for the protection of game animals and birds and be recognized as a breeding place therefor." Under authority of this Act, the President, by Proclamation of June 2, 1905, 34 Stat. 3062, designated the entire area of the Wichita Forest Reserve, as it then existed, as a game reserve.

Subsequent thereto, by Proclamations of May 29, 1906, 34 Stat. 3207, and of October 13, 1910, 36 Stat. 2754, additional lands were included within the Wichita Forest Reserve. It appears, however, that these additional lands have never been made a part of Wichita National Game Reserve, either by Act of Congress or by Proclamation or Executive order. Such added areas are, therefore, subject to all legal restrictions applicable to national forest reservations, but are not subject to any additional restrictions applicable to the original area of the Wichita Forest Reserve by reason of its establishment as the Wichita National Game Reserve.

However, the Act of June 4, 1897, ch. 2, 30 Stat. 11, which makes provisions for the protection and control of forest reservations established under section 24 of the act of March 3, 1891, states (p. 35) that "it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes", and (p. 36) that nothing therein shall "prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." The Act also provides (p. 36) that "any mineral lands in any forest reservation * * * subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry."

It follows, therefore, that the lands within the areas added to the Wichita Forest Reserve after the date of the Proclamation creating the Wichita National Game Reserve are, as to their mineral resources, subject to entry, location, and development under the United States mining laws.

Respectfully,

HOMER CUMMINGS.

To the Secretary of the Interior.

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COMPROMISE OF CASES INVOLVING THE FORFEITURE OF VEHICLES SEIZED FOR VIOLATION OF THE INTERNAL REVENUE LAWS

The primary object of the Government in requiring a forfeiture of a vehicle for violation of its laws is to punish the violator by depriving him of his property, but the Government is also interested in obtaining the greatest amount possible in disposing of the vehicle.

In considering compromise offers submitted in cases involving the forfeiture of vehicles seized for violation of internal revenue laws, the inability of the Government to obtain from a sale of the vehicle, after deducting the expenses of forfeiture and sale, as much as the amount offered in compromise may be treated as *uncertainty as to collection*, within the meaning of that term as used in the opinions of the Attorney General to the Secretary of the Treasury dated October 24, 1933, and October 2, 1934.

DEPARTMENT OF JUSTICE,
March 7, 1935.

SIR: I have the honor to acknowledge your letter of February 19, 1935, relating to your authority, under the provisions of Section 3229 of the Revised Statutes, to compromise cases involving the forfeiture of vehicles which have been seized for violation of the internal revenue laws.

You state that in cases of automobiles which have been seized for violation of the internal revenue laws, wherein there is usually no apparent uncertainty as to the liability of the automobiles to forfeiture, interested parties frequently offer in compromise amounts apparently larger than the net amounts which, after payment of storage and other charges, could be realized by the United States if the automobiles should be forfeited and sold at public auction. You further state that it has been the established practice of the Treasury Department for more than fifty years to compromise cases of this character on the basis above indicated.

In view of the conclusions reached in my opinions addressed to you on October 24, 1933 (38 Op. 94), and October 2, 1934 (38 Op. 98), to the effect that your power to compromise under the provisions of Section 3229 of the Revised Statutes of the United States, exists only in cases in which there is uncertainty as to liability or collection, you apparently entertain some doubt as to whether you may lawfully continue the above practice and request my opinion as to whether, in considering these offers in compromise, you may

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lawfully treat the inability of the Government to obtain more from a sale of the vehicle than the amount offered in compromise as an "uncertainty as to collection", within the meaning of that term as used in my opinions above mentioned.

Section 3229 of the Revised Statutes provides as follows:

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise."

The language of the above-quoted section is broad and authorizes the compromise of any *civil or criminal case* arising under the internal revenue laws. It clearly includes forfeiture cases arising under those laws.

The question whether uncertainty as to collection exists in the class of cases which you have presented is dependent upon the nature and extent of the Government's interest in a vehicle which has been seized and forfeited for violation of its laws. The primary object of the Government in forfeiting a vehicle is clearly to punish the violator by depriving him of his property. It is true that a forfeiture proceeding is *in rem* and that by a legal fiction the property is held guilty and condemned as though it were conscious instead of inanimate and insentient. See *Various Items* v. *United States*, 282 U. S. 577, 581. But that fiction, resorted to for the purpose of upholding the Government's right to forfeit the vehicle as against persons other than the violator, is not determinative of the question as to whether the Government's sole interest in forfeiting the vehicle is that of removing it from the possession of others or whether its interest is also of a fiscal nature.

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Under the laws and procedure governing the disposal of property forfeited under the laws of the United States, vehicles and other property, except that which is prohibited, must be sold at public sale, and after payment of the expenses of the forfeiture and sale, the remainder of the proceeds must be covered into the Treasury. These laws clearly demonstrate that the United States, notwithstanding any other interest, is interested in the value of forfeited vehicles. That is, it is interested in obtaining the greatest amount possible when it disposes of the vehicle.

There are various other laws which lend support to the view that the Government has a fiscal interest in forfeited property, among which is Section 3459 of the Revised Statutes, providing that perishable property seized for tax evasion may be sold before forfeiture if the claimant fails to give a bond and take delivery. This statute is designed to preserve the value of the property and clearly indicates that the United States has a financial interest therein. The Tariff laws are also analogous in that they provide for the release of seized property upon payment of the appraised value thereof or the giving of a substitute bond. Section 614, Tariff Act of 1930 [46 Stat. 757]; Section 938, Revised Statutes.

The United States having a fiscal interest in the vehicles seized, it necessarily follows that it is interested in the amount which it will be able to obtain from a sale of such vehicles. It is obvious, therefore, that it would be in the financial interest of the United States to accept an offer in compromise in any case which would bring into the Treasury more money than could be obtained from a sale of the vehicle after deducting the expenses attending the forfeiture and sale thereof.

In view of the conclusion I have reached that it would be clearly in the interest of the United States to accept offers in compromise in cases of the character and on the basis stated by you and in view of the long established practice of the Treasury Department in accepting offers in compromise on that basis I cannot, at this late date, advise you to disregard the apparent interests of the United States in deference to the principle that the interest of the Govern-

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ment in the vehicle itself is paramount to its interest in the value thereof.

Accordingly, it is my opinion that in the consideration of offers in compromise submitted to you in cases involving the forfeiture of vehicles seized for violation of the internal revenue laws, the inability of the Government in any case to obtain from a sale of the vehicle, after deducting the expenses of forfeiture and sale, as much as the amount offered, may be properly treated by you as *uncertainty as to collection* within the meaning of that term as used in my opinions of October 24, 1933, and October 2, 1934, above mentioned. I assume, of course, that your request for my opinion does not relate to cases which have been referred to this Department for the institution of forfeiture proceedings or otherwise. Perhaps I should also state that I deal herein only with the question of power, the exercise of which is discretionary and may depend upon considerations other than monetary.

Respectfully,

HOMER CUMMINGS.

TO THE SECRETARY OF THE TREASURY.

CONSTITUTION FOR THE GOVERNMENT OF THE PHILIPPINE ISLANDS

The proposed constitution for the government of the Philippine Islands, as adopted by the Constitutional Convention, is in substantial conformity with the provisions of the act of March 24, 1934, 48 Stat. 456.

Certain differences between the provisions of the proposed constitution and the provisions of the act discussed and held to be immaterial.

DEPARTMENT OF JUSTICE,
March 11, 1935.

SIR: I have your letters of February 19 and March 5, transmitting a copy of a "Draft of Constitution for the Government of the Commonwealth of the Philippine Islands as adopted by the Constitutional Convention", and a copy of an opinion of the Judge Advocate General with reference thereto. You request my opinion whether the proposed constitution conforms with the provisions of the Act of March 24. 1934, c. 84, 48 Stat. 456.

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In a few instances, as pointed out by the Judge Advocate General, the strict letter of the statute has not been followed. Thus, the statute refers to the new government, authorized to be established and to function pending final and complete withdrawal of the sovereignty of the United States, as "the government of the Commonwealth of the Philippine Islands", while the proposed constitution provides that "the government established by this Constitution shall be known as the Commonwealth of the Philippines." This difference is of no consequence and, in fact, the words in the statute are only descriptive, evidencing no purpose that the term employed by the Congress for convenience of designation should be regarded as mandatorily determining the precise name of the government.

Section 1 of the statute provides that the new government shall exercise jurisdiction over "all the territory ceded to the United States by the treaty of peace concluded between the United States and Spain on the 10th day of December 1898, the boundaries of which are set forth in article III of said treaty, together with those islands embraced in the treaty between Spain and the United States concluded at Washington on the 7th day of November 1900." The constitution, after reciting the substance of the quoted provision, adds thereto, "and in the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction." If it were a fact that these additional words embraced lands beyond the contemplation of the statute they would be of no effect though finally included in the constitution. It is my understanding, however, that they do not embrace any lands not included within the terms of the statute. The treaty with Great Britain merely established boundaries which theretofore had been uncertain. I therefore regard the added words as unobjectionable.

The Judge Advocate General also mentions the fact that the proposed constitution contains provisions respecting the making of war, the appointing and receiving of ambassadors, other public ministers and consuls, and the negotiation of treaties. However, the "Ordinance appended to the Con-

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stitution" provides, in the precise words of the federal statute, that "foreign affairs shall be under the direct supervision and control of the United States", pending final withdrawal of American sovereignty. The Judge Advocate General suggests the advisability of an unequivocal declaration, beyond this, that the war power and the power over foreign affairs shall not be exercised pending such withdrawal of American sovereignty. I do not regard this as necessary and, as indicated, the provision follows the statute literally. "Foreign affairs", I think, is sufficiently broad to contemplate foreign wars as well as all peace-time dealings with foreign nations.

In my opinion the proposed constitution substantially conforms with the provisions of the Act of March 24, 1934, c. 84, 48 Stat. 456.

Respectfully,

HOMER CUMMINGS.

To the Secretary of War.

RECONSIDERATION OF OPINION OF ACTING ATTORNEY GENERAL DATED JULY 19, 1918—APPLICABILITY OF THAT OPINION TO QUESTION OF TAXABILITY OF COMPENSATION PAID TO OFFICERS AND EMPLOYEES ADMINISTERING STATE WORKMEN'S COMPENSATION FUND OF CALIFORNIA

It is doubtful whether the opinion of the Acting Attorney General of July 19, 1918, should be reconsidered, for the questions dealt with therein are essentially different from the question now under consideration, and the conclusion reached in that opinion is not questioned and does not necessarily affect the case presented.

The opinion of July 19, 1918, should be considered as confined to the specific questions therein considered and not as controlling in determining whether compensation paid from the State Workmen's Compensation Fund of California to officers and employees administering such fund is taxable by the Federal Government.

Department of Justice,
April 4, 1935.

Sir: I have your letter of March 11 in which you request my reconsideration of the Acting Attorney General's opinion of July 19, 1918 [31 Op. 308], because, as you state, it may

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hamper your Department in following a policy which you believe to be justified by the more recent decisions of the Supreme Court.

That opinion dealt with the following provisions contained in Section 11 (b) of the Act of September 8, 1916, 39 Stat. 756, 765, 767, and Section 504 (c) of the Act of October 3, 1917, 40 Stat. 316:

"SEC. 11 (b): There shall not be taxed under this title any income derived from any public utility or from the exercise of any essential governmental function accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, * * *. *Provided*, That whenever any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, has, prior to the passage of this title, entered in good faith into a contract with any person or corporation, the object and purpose of which is to acquire, construct, operate, or maintain a public utility, no tax shall be levied under the provisions of this title upon the income derived from the operation of such public utility, so far as the payment thereof will impose a loss or burden upon such State, Territory, or the District of Columbia, or a political subdivision of a State or Territory; * * *."

"SEC. 504 (d): Policies issued by any person, corporation, partnership, or association, whose income is exempt from taxation under Title I of the Act entitled 'An Act to increase the revenue, and for other purposes', approved September 8, 1916, shall be exempt from the taxes imposed by this section."

The first quoted Section was interpreted as exempting income accruing *to the State of Pennsylvania* from the fund created by the State Workmen's Compensation Act. Section 504 (c) was interpreted as exempting insurance policies, payable out of such fund, from the taxes imposed on insurance policies generally, but this, under the terms of the statute, was controlled by the answer to the first question.

Your General Counsel suggests that the Acting Attorney General erred in his comments upon certain decisions of the Supreme Court, and particularly in the following statement, when the matter is viewed in the light of subsequent decisions of the Court:

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"The function of the courts in this connection is merely to declare whether the acts of the several States or of the United States are within the constitutional limits prescribed to them; that is, whether they are exercising in the particular act in question their sovereign powers as defined by their respective constitutions. To determine this question, the courts have the standard of the Constitution, together with various rules of interpretation established by law. When it has once been determined that the act is within the constitutional power of the State or of the United States, there is no safe standard which the courts can employ to determine whether the particular act is essential to governmental action or not. Until such a standard is set up it seems to be exceedingly unsafe to permit speculation as to the operation and effect of various acts to control the judgment of the court upon the point of their essentiality." [31 Op. 316].

You state you are now dealing with the question whether compensation paid *to officers and employees* administering the State Workmen's Compensation Fund of California is subject to the Federal taxing power under the Constitution—which is essentially a different question from those dealt with in the opinion. In view of this, and since you do not question the conclusion reached in the opinion and do not present a case necessarily affected by that conclusion, it is doubtful that a reconsideration should now be undertaken.

However, as I understand it, you are concerned only to the extent that you wish to levy taxes upon income accruing to the officers and employees administering such state compensation funds but do not wish to appear to act in conflict with an opinion of the Attorney General. Addressing myself to the question thus presented, I have the honor to advise you that the opinion of July 19, 1918, should be considered as confined to the specific questions therein dealt with and not as controlling in the matter of the taxability of income payable from such state funds to individual officers and employees.

Respectfully,

HOMER CUMMINGS.

To the Secretary of the Treasury.

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ENTITLEMENT TO COMPENSATION UNDER THE WORLD WAR ADJUSTED COMPENSATION ACT

Claimant was inducted into military service October 20, 1917, but was absent without leave and charged with desertion from December 2, 1917, until October 10, 1919, when he was arrested and returned to the Army. Subsequently, because of his mental condition the charge of desertion was removed and he was honorably discharged from the Army December 17, 1919.

Held, the claimant is not entitled to compensation under the World War Adjustment Compensation Act.

Opinion of Attorney General Stone of July 26, 1924 (34 Op. 228), *distinguished.*

DEPARTMENT OF JUSTICE,
April 10, 1935.

SIR: I have your letter of March 6, requesting my opinion in connection with the application of E. M. for adjusted compensation under the provisions of the Act of May 19, 1924, c. 157, 43 Stat. 121, 122, which provides for computing such compensation on the following basis:

"SEC. 201. The amount of adjusted service credit shall be computed by allowing the following sums for each day of active service, in excess of sixty days, in the military or naval forces of the United States after April 5, 1917, and before July 1, 1919, as shown by the service or other record of the veteran: $1.25 for each day of oversea service, and $1 for each day of home service; but the amount of the credit of a veteran who performed no oversea service shall not exceed $500, and the amount of the credit of a veteran who performed any oversea service shall not exceed $625."

You state that the claimant was inducted into the military service on October 30, 1917, but was absent without leave and charged with desertion from December 2, 1917, until October 10, 1919, at which time he was arrested by the civil authorities and returned to the army. Upon inquiry by a board of medical officers it was determined that he had the mentality of a child less than six years old, and for this reason the charge of desertion was removed and he was honorably discharged from the army on December 17, 1919.

Attorney General Stone, construing the statute in an opinion of July 26, 1924 (34 Op. 228), held that periods of absence without leave, not resulting in dishonorable discharge, should be included when computing the period of

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active service, "but that the period of time in desertion should not be counted except where tried for desertion and acquitted, or conviction did not result in * * * separation from the service under conditions other than honorable"—the statute expressly excluding persons dishonorably discharged.

Observing the strict letter of the opinion and accepting its conclusions, it might be said, as you point out, that the claimant would be entitled to have the entire period of his desertion, or absence without leave, counted when computing his active service. The opinion did not, however, deal specifically with a case, such as this, in which the desertion or unauthorized absence effectually terminated all actual military service and was coextensive with the entire period for which adjusted compensation might have been allowed (such period not beginning to run until sixty days after entry into the service); and the reasoning of the opinion does not appear to require the application of its conclusion to such a case. Probably the Attorney General had particularly in mind absences and periods of desertion only incidental to some actual period of active service compensable under the statute.

It would hardly be thought that a soldier who had deserted the army some years before the World War began might now appear, satisfactorily explain his desertion, obtain an honorable discharge, and thereupon claim benefits under the World War Adjusted Compensation Act for active service during the World War, yet he might do so if, under the statute, a soldier is to be considered as rendering active service during the entire period of a desertion or unauthorized absence not followed by dishonorable discharge. The case now submitted is not quite so extreme, but it presents the same question to the extent that the unauthorized absence covered the entire period for which credit is claimed.

The bill to provide adjusted service compensation, as introduced in the 67th Congress (the measure was finally enacted in the succeeding Congress), provided for deducting periods of unauthorized absences of more than one day; but this was eliminated upon recommendation of the Adjutant General of the Army, who stated that the administration of such a provision, requiring detailed examination of

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all service records, would cost much more than it would save. (Hearings, H. R. 1, 67th Cong., pp. 108–114, 599–605.) There is little doubt that this view resulted in the enactment of the statute in such form as to permit indulging the fiction of rendition of "active service" during unauthorized absences; but the reason which prompted it does not apply to cases in which the absence or desertion effectually terminated all actual military service and was coextensive with the entire period for which adjusted compensation might have been allowed.

Considering the foregoing, it is my opinion that the claimant is not entitled to compensation under the World War Adjusted Compensation Act.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

AUTHORITY TO MAKE ADDITIONS TO CARSON NATIONAL FOREST IN NEW MEXICO

The prohibition contained in section 471, Title 16, U. S. C., against creating or making additions to forest reservations in the States of New Mexico and Arizona, except by act of Congress, is applicable as to lands purchased by the Federal Emergency Relief Administration, as an agency of the Public Works Administration, under authority of Title II of the National Industrial Recovery Act; and such lands may not be added to the Carson National Forest in New Mexico, except by act of Congress.

DEPARTMENT OF JUSTICE,
April 15, 1935.

SIR: I have your letter of February 28, in which you state that $25,000,000 of the fund provided for Public Works under Title II of the National Industrial Recovery Act [48 Stat. 201] has been allocated to the Federal Emergency Relief Administration, as an agency of the Public Works Administration, for carrying out a program of projects including the following:

"The purchase of land which can better be devoted to bearing forests than to the uses to which it is being put at the time of purchase, and the improvement of such land

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through ditching, grading, clearing, construction of roads and trails, tree planting, grassing, growing of erosion-resisting crops, fencing, and erection of other necessary structures and improvements to enable the land to be devoted to the new uses. Purchase of the land is a necessary incident to the performance of the development and improvement work, which will provide employment and constitutes a project which the Administrator and Special Board for Public Works have included in the comprehensive program of public works authorized in Section 202 under Title II of the Recovery Act. Such forest lands, after the construction and developmental work has been completed, are either to be assigned to the Forest Service in the Department of Agriculture for administration as national forests or are to be leased to states and state agencies for administration as state forests. One of the incidental advantages that will be derived from this program will be the retirement of lands which are submarginal for agriculture from production of crops for the market."

You further state that consideration is being given to the purchase of lands in New Mexico, "which, if they are suitably improved, will be appropriate for addition to the Carson National Forest in that state," but that the question has arisen whether this is authorized in view of the following legislative provisions, as contained in Section 471, Title 16, of the United States Code, as amended.

"The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

"No national forest shall be created, nor shall any additions be made to one heretofore created within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. (Mar. 3, 1891, c. 561, Sec. 24, 26 Stat. 1103; Mar. 4, 1907, c. 2907, 34 Stat. 1271; June 25, 1910, c. 421, Sec. 2, 36 Stat. 847; Aug. 24, 1912, c. 369, 37 Stat. 497; June 7, 1924, c. 348, Sec. 9, 43 Stat. 655.)

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"No forest reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona except by Act of Congress. (June 15, 1926, c. 587, 44 Stat. 745.)"

Your Solicitor has concluded that the inhibition contained in the third paragraph does not apply because it is to be understood as referring to additions of "public lands" of the character dealt with in the first paragraph, not including lands purchased by the United States as now contemplated. Assuming, however, that this is correct, it does not follow that purchased lands may be added to the Carson National Forest because the inhibition is co-extensive, at least, with the authority previously granted, as stated in the following excerpt from the Acting Attorney General's opinion of November 28, 1916 (31 Op. 53, 54).

"What the legislation of 1907 aimed to prevent (in the States named) was the increase, by Executive action based on the acts of 1891 and 1897, *supra*, of the areas designated and set apart as national forests and administered as such pursuant to the forest reserve legislation. If such increases were to occur, that act intended that they should be brought about only by the direct action of Congress. *Pro tanto*, it worked a repeal of the acts of 1891 and 1897, *supra*. *They had given the President authority to create forest reservations in these States; the act of 1907 simply took that authority away.*"

"National Forest" is not a mere matter of descriptive terminology. It is designative of definite areas set aside by authority of the Congress and made subject to laws and regulations effective only in such areas. Presumably their establishment and management represent exercises of the constitutional grant of power to the Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

There is no power in the Public Works Administration, the Federal Emergency Relief Administration or the Secretary of Agriculture to subject other lands to such laws and regulations in the absence of a statute authorizing it; and I agree with the conclusion of your Solicitor that no such authority is to be implied from the provisions of the National

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Industrial Recovery Act. The only other statute which you mention as a possible source of power authorized the President to establish national forests, but such authority, as applied to New Mexico, has now been withdrawn. In such circumstances, and unless the matter is affected by some other statute to which my attention has not been directed, there is nothing from which the power could be implied, the subject matter not falling within any constitutional prerogative of the President.

I express no opinion whether the proposed purchase is authorized. You have not requested my opinion concerning this and presumably it does not arise primarily in your Department. If, however, the lands are purchased it will be necessary, in my opinion, to obtain additional legislation in order to make them a part of the Carson National Forest. I may add, although you are, of course, aware of the fact, that such statutes, adding lands to particular national forests, are frequently passed by the Congress.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF AGRICULTURE.

APPLICABILITY OF TITLE III OF THE TREASURY AND POST OFFICE APPROPRIATION ACT, FISCAL YEAR 1934, TO GRANTS TO THE GOVERNORS OF THE SEVERAL STATES FOR EMERGENCY RELIEF PURPOSES

Grants from funds appropriated by Public Resolution No. 11, approved April 8, 1935, to the Governors of the several States for emergency relief purposes are *projects* within the meaning of section 13 of that Resolution, whether for construction work or for the purchase of such items as food and clothing; and such grants are subject to the provisions of Title III of the Treasury and Post Office Appropriation Act, fiscal year 1934 (47 Stat. 1520).

DEPARTMENT OF JUSTICE,
April 25, 1935.

SIR: I have your memorandum of April 15, transmitting a request from the Federal Emergency Relief Administrator for my opinion "whether grants to the Governors of the several States for emergency relief constitute projects" within the meaning of the word as used in the second paragraph of the following section of Public Resolution No. 11,

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approved April 8, 1935, making appropriations for relief purposes:

"SEC. 13. (a) The acquisition of articles, materials, and supplies for the public use, with funds appropriated by this joint resolution, shall be subject to the provisions of section 2 of title III of the Treasury and Post Office Appropriation Act, fiscal year 1934; and all contracts let pursuant to the provisions of this joint resolution shall be subject to the provisions of section 3 of title III of such Act.

"(b) Any allocation, grant, or other distribution of funds for any project, Federal or non-Federal, from the appropriation made by this joint resolution, shall contain stipulations which will provide for the application of title III of such Act to the acquisition of articles, materials and supplies for use in carrying out such project."

This section was introduced as an amendment by Senator Steiwer with the following explanation concerning the second paragraph:

"Section (b) provides, in effect, that in case of the allocation or grant of money from the appropriation provided by the joint resolution to the States for the construction of Federal or non-Federal projects, the act to which I have referred shall also be applicable * * *

"The * * * section is necesary, for it has been held heretofore, in the matter of moneys allocated by the Government to States or municipalities to be spent by them in the making of their own contracts, that the 'buy American' provision does not apply; therefore, if it be desired that it apply, it is necessary that section (b) be agreed to." (Cong. Rec. March 21, 1935, p. 4312.)

The provision was explained as follows in the conference report (H. Rept. 609, p. 9):

"Amendment no. 26: Retains the section inserted by the Senate providing for the application to the expenditure of funds directly by the United States and funds granted or distributed for expenditure otherwise, of the Federal law providing for the acquisition of articles, materials, and supplies mined, produced, or manufactured in the United States (Buy American Act)."

The Act containing the stipulations referred to is Title III, 47 Stat. 1520; U. S. C., Title 41, secs. 10a and 10b.

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Standard Dictionary defines "project" as: "Something projected or mapped out in the mind, as a course of action; a scheme; plan; contrivance; as, a useful project." It is also defined in Webster's International Dictionary as: "A plan or design; a plan as devised or proposed; a planned undertaking, etc."

Assuming the Governor or other state officer plans the utilization of the allotted fund, the plan adopted is a "project", within the foregoing definitions, whether it calls for the hiring of destitute persons for roadbuilding and the like, or for the more direct alleviation of their needs through the purchase and distribution of food, clothing, etc. It might combine both features. In so far as it contemplates roadbuilding, for example, it might be referred to as a "construction project", and the first quoted paragraph of Senator Steiwer's explanation indicates that he may have had particularly in mind such projects; but neither his language nor that of the conference report indicates that the word is necessarily to be taken only in this narrow sense.

I perceive no substantial reason, in connection with this provision, for distinguishing between purchases of food and clothing, on the one hand, and purchases of roadbuilding material, for example, on the other hand; and, indeed, it more nearly accords with the broad purpose of this statute and of other emergency legislation to give preference to American products because to the extent that our own industry is stimulated, with resulting increases in employment, needs for relief should diminish. It is scarcely necessary to say that this is the end toward which we are striving, and it is with this end in view that the statute should be interpreted.

I therefore concur in the conclusion reached by Counsel for the Federal Emergency Relief Administration that the stipulations provided for in Section 13 (b) of Public Resolution No. 11 should be included in connection with grants to the Governors of the several states for emergency relief purposes.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

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DUTY OF THE AMERICAN PRINTING HOUSE FOR THE BLIND TO FURNISH THE LIBRARY OF CONGRESS COPIES OF CERTAIN BOOKS

The provision contained in the Legislative, Executive, and Judicial Appropriation Act of the fiscal year ending June 30, 1914 (37 Stat. 739, 748), that the distribution of embossed books manufactured by the American Printing House for the Blind out of the income provided by the act of March 3, 1879, 20 Stat. 467, shall thereafter include one copy of every book so manufactured to be deposited in the Library of Congress, has the effect of amending the said act of March 3, 1879, and the American Printing House for the Blind is required to furnish the Library of Congress a copy of every embossed book manufactured out of the entire sum of its present annual appropriation of $75,000.

The fact that administrative practice has been in accord with this view for nearly 16 years is entitled to great weight in determining the proper construction of the statute.

DEPARTMENT OF JUSTICE,
May 2, 1935.

SIR: I have your letter of March 4, 1935, with enclosure, in which you refer to the Act of March 3, 1879, 20 Stat. 467, entitled "An Act to promote the education of the blind" and state that there is a difference of opinion between the American Printing House for the Blind and the Library of Congress as to whether the funds appropriated by the Congress under this act and subsequent acts are being used in accordance with law. Since the law authorizes the Secretary to withhold such appropriations on satisfactory proof that they are not being used for the benefit of the blind in the public institutions for the blind in the United States, the question is one requiring your administrative determination, and for this reason you request my opinion whether the American Printing House for the Blind is required to supply the Library of Congress with a copy of every book embossed out of the entire federal gratuity of $75,000, or whether it is required to supply copies of only those books embossed out of the original annual appropriation of $10,000.

Under the original Act of March 3, 1879, *supra*, there was appropriated $250,000 to be invested in four per cent Government bonds, the interest therefrom ($10,000 per annum) to be paid by the Secretary of the Treasury semi-annually

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to the Trustees of the American Printing House for the Blind and used in the manufacture of embossed books and tangible apparatus to be uniformly distributed to all public institutions for the education of the blind in the States and Territories of the United States and the District of Columbia. This act was amended by the act of July 25, 1906, 34 Stat. 460, so as to make the sum of $10,000 a permanent annual appropriation.

In the Legislative, Executive, and Judicial Appropriation Act for the fiscal year ending June 30, 1914 (37 Stat. 739, 748), the distribution of embossed books manufactured out of the annual appropriation of $10,000 was extended to include the Library of Congress. This provision reads as follows:

"The distribution of embossed books manufactured by the American Printing House for the Blind at Louisville, Kentucky, out of the income of the fund provided by the Act of March third, eighteen hundred and seventy nine, shall hereafter include one copy of every book so manufacfactured to be deposited in the Library of Congress at Washington."

In 1919 the Congress authorized the sum of $40,000 to be appropriated annually to the American Printing House for the Blind in addition to the permanent appropriation of $10,000 (41 Stat. 272), and increased this sum to $65,000 in 1927 (44 Stat. 1060). Both acts contained identical language to the effect that the additional sums authorized should be expended in accordance with the requirements of the act of March 3, 1879, as amended. This direction was understood, at least by the Librarian, as contemplating that the Library should receive one copy of each book paid for out of the additional appropriations in like manner as under the original appropriation, and this view has prevailed in the administration of the statute and in the distribution of the books. Recently, however, the Trustees of the Printing House asserted that the Library should be included in the distribution only of such books as might be embossed from the annual sum of $10,000 originally authorized.

In view of the statutory direction that the additional sums appropriated should be expended in accordance with the

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requirements of the act of March 3, 1879, as amended, the question here presented depends on whether the provision contained in the Appropriation Act for the fiscal year 1914, above quoted, had the effect of amending the original act.

The provision for furnishing copies to the Library of Congress was not expressly stated as "amending" the original Act. It has been held, however, that "a law is amended when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it is made, or some other object or purpose." *United States* v. *Lapp*, 244 Fed. 377, 383. The provision under consideration would appear to meet this test; it modified and added to the original direction concerning distribution of the books.

Other arguments have been advanced in favor of the view that the additional sums are to be expended in accordance with the Act of March 3, 1879, standing alone, but they are based largely upon fine distinctions of language, and I regard it as unnecessary to deal with them specifically herein. It must be conceded, of course, that the statutes authorizing the additional annual appropriations did not indicate as clearly as might be wished whether the direction contained in the 1913 statute should apply in connection with the additional funds.

There was, however, no apparent reason of substance for making the distinction suggested; and the basic reason for the provision that the Library should be furnished with one copy of each book would probably apply equally in connection with the additional appropriations. It must, therefore, be concluded that, whatever doubt may have existed when the additional appropriation was first authorized in 1919, there was at least some justification for the view that was adopted; and during the nearly sixteen years which have since elapsed both the Congress and the Secretary of the Treasury have acquiesced in the practical interpretation thus placed upon the statute. Only the most cogent reasons would now justify administrative reversal of that construction (*United States* v. *Jackson*, 280 U. S. 183, 193), and I perceive no such reasons.

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In view of the foregoing, it is my opinion that the American Printing House for the Blind is required to furnish the Library of Congress one copy of every embossed book manufactured out of the entire Federal appropriation.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

AUTHORITY OF THE RECONSTRUCTION FINANCE CORPORATION TO ENGAGE THE LEGAL SERVICES OF A MEMBER OF CONGRESS

The Reconstruction Finance Corporation, the contracts and agreements of which are subject to sections 114–116 of the Criminal Code, is not authorized to engage the services, as attorney or counsel, of a Member of Congress or a firm of which a Member of Congress is a partner.

The rule *expressio unius est exclusio alterius* applied.

DEPARTMENT OF JUSTICE,
May 8, 1935.

SIR: I have your memorandum of April 29, 1935, transmitting a request from the Chairman of the Reconstruction Finance Corporation for my opinion whether the Corporation may engage the services, as attorney or counsel, of a Member of Congress or a firm in which a Member of Congress is a partner.

The Act of January 22, 1932, c. 8, 47 Stat. 5, 12, which created the Reconstruction Finance Corporation, provides that its contracts and agreements shall be subject to the following sections (114, 115 and 116) of the Criminal Code (U. S. C., Title 18, Secs. 204–206):

"Sec. 114. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement, made or entered into in behalf of the United States by any officer or person authorized to make

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contracts on its behalf, shall be fined not more than three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced by the United States, in consideration of any such contract or agreement, it shall forthwith be repaid; and in case of failure or refusal to repay the same when demanded by the proper officer of the department under whose authority such contract or agreement shall have been made or entered into, suit shall at once be brought against the person so failing or refusing and his sureties, for the recovery of the money so advanced.

"Sec. 115. Whoever, being an officer of the United States, shall on behalf of the United States, directly or indirectly, make or enter into any contract, bargain, or agreement, in writing or otherwise, with any Member of or Delegate to Congress, or any Resident Commissioner, after his election or appointment as such Member, Delegate, or Resident Commissioner, and either before or after he has qualified, and during his continuance in office, shall be fined not more than three thousand dollars.

"Sec. 116. Nothing contained in the two preceding sections shall extend, or be construed to extend, to any contract or agreement made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company; nor to the purchase or sale of bills of exchange or other property by any Member of or Delegate to Congress, or Resident Commissioner, where the same are ready for delivery, and payment therefor is made, at the time of making or entering into the contract or agreement." (35 Stat. 1109.)

These provisions originated in the Act of April 21, 1808, c. 48, 2 Stat. 484. Attorney General Wirt, in an opinion of July 18, 1826, held that the statute forbade the employment of congressmen as assistant counsel to the district attorneys of the United States, pointing out that such employment would involve "a contract, a bargain, an agreement," undistinguishable from others undoubtedly forbidden and "equally within the policy and mischief of the law." (2 Op. 38, 40.)

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Attorney General Legare, in an opinion of June 1, 1842, (4 Op. 47, 48), dealt with a situation in which the Commissioners of the Navy had accepted an offer from a partnership to supply chain-cable iron and it appeared that one of the partners, being a member of Congress, had expressly stated his position that he could not, "consistently with existing law, take any interest, direct or indirect, in the proposed contract," and had executed an instrument "relinquishing all interest" therein. The Attorney General, after stating that he was not properly concerned with questions of expediency, propriety, etc., concluded that, "in strict law", the contract would not be voided or the penalty incurred. He pointed out, however: "But then the contract will not be with the same partnership. It will be a special contract with the two other partners, * * *."

It was thus assumed that a contract with a partnership which included a member of Congress was forbidden; and this I approve. It is unnecessary for me to consider the soundness of the conclusion that the matter was remedied by the steps taken.

Judge Van Devanter, in *United States* v. *Dietrich*, 126 Fed. 671, 673, 676, declared the statute to be plain and unambiguous and purposed "to absolutely inhibit all contractual relations with the United States upon the part of any member of or delegate to Congress * * * save in the instances specifically excepted." In such circumstances, as stated in my opinion of December 16, 1933 (37 Op. 368), to the Secretary of Agriculture, the statute is not subject to a construction which might narrow its application. Furthermore, it expressly excepts contracts with "incorporated companies" and, as applied to unincorporated companies or partnerships, required the application of the rule *expressio unius est exclusio alterius.*

Considering the foregoing, it is my opinion that the Reconstruction Finance Corporation is not authorized to engage the services, as attorney or counsel, of a member of Congress or a firm in which a member of Congress is a partner.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

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JURISDICTION OF UNITED STATES OVER SITE OF NAVAL AMMUNITION DEPOT AT HAWTHORNE, NEV.

The act of the legislature of Nevada, approved March 28, 1935, ceding to the United States jurisdiction over the site of the Naval Ammunition Depot at Hawthorne, Nev., but reserving to the State and political subdivisions thereof the right to tax private property and to serve process upon the affected premises, is considered satisfactory to the Government, and no further action by the Navy Department is required.

DEPARTMENT OF JUSTICE,
May 28, 1935.

SIR: I have your letter of May 6, transmitting a copy of an Act of the Legislature of Nevada, approved March 28, 1935, ceding to the United States jurisdiction over the site of the Naval Ammunition Depot at Hawthorne, Nevada, but reserving to the State and political subdivisions thereof the right to tax private property and to serve process upon the affected premises. You inquire whether the Department of Justice considers the statute satisfactory from the government's standpoint and what, if any, action should be taken by the Navy Department.

As you state, this act was passed as a compromise after extended negotiations in which the United States Attorney participated, and there is no question of the power of the State to make the reservations concerning taxation of private property and service of process, under several decisions of the Supreme Court.

Considering this, and since you also state that the reservations are not inconsistent with the effective use of the lands for a Naval Ammunition Depot, I regard the act of cession as satisfactory and requiring no further action by the Navy Department—understanding, of course, that the statute adequately describes the site. I have no reason to doubt that the designation in the statute is sufficiently broad to include all the land now owned by the Government at the Ammunition Depot, but it would be advisable to have this verified by some one in your Department familiar with the facts, which are not available in my Department.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE NAVY.

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CITIZENSHIP OF ADOPTED CHILD

Miss S was born in Switzerland in May 1917 and adopted according to Swiss law in April 1921 by Mrs. S, then a citizen of Switzerland. Mrs. S emigrated to the United States in June 1921 and was naturalized in December 1926. Miss S came to the United States in May 1927, and since then has resided with her adoptive mother in Ohio.

***Held*, Miss S is not to be deemed a citizen of the United States by virtue of the naturalization of her adoptive mother.**

The terms "child" and "children" occurring, respectively, in section 5 of the Act of March 2, 1907, 34 Stat. 1229, and section 4 of the Act of April 14, 1802, 2 Stat. 155, do not comprehend *adopted* children.

Under our *immigration* laws an adopted child may in some circumstances be considered a "child" of an adoptive parent, but it does not follow that such child may be so considered within the contemplation of other and separate laws relating to citizenship.

When doubts exist as to a grant of citizenship they should, generally, be resolved in favor of the United States and against the claimant.

DEPARTMENT OF JUSTICE,
June 17, 1935.

SIR: I have the honor to refer to your letter of October 10, 1934, and subsequent correspondence and conferences concerning the citizenship of Miss S. You ask my opinion whether she is to be deemed a citizen of the United States by virtue of the naturalization of her adoptive mother.

Miss S. was born in Switzerland on May 9, 1917. She was adopted according to Swiss law on April 9, 1921, by Mrs. S, then also a citizen of Switzerland. Mrs. S emigrated to the United States in June, 1921, and was naturalized on December 11, 1926. The child came to the United States in May, 1927, and since then has resided with her adoptive mother in Ohio.

Section 5 of the Act of March 2, 1907, c. 2534, 34 Stat. 1228, 1229 (U. S. C., Title 8, Sec. 8), is applicable. It reads as follows:

"SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of

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such minor child shall begin at the time such minor child begins to reside permanently in the United States."

In the Department of Labor, which is charged with administration of the immigration laws, the view has prevailed that an adopted child does not become a citizen by virtue of the naturalization of his adoptive parent. On the other hand, the Department of State in 1929 took the position that such a child was entitled to a passport as an American citizen and has subsequently applied this view in at least one other case, excluding cases now pending. Your Legal Adviser states, in support of the conclusion thus previously reached in your Department, that the words, "children" and "parents," as used in an earlier statute (Section 2172 R. S.; U. S. C., Title 8, section 7), comprehended adopted children and the persons adopting them and that "the reason for the enactment of the later Act of 1907 was quite remote from any intent to give a different significance to these words from that which they had in the earlier Act." Section 2172 R. S. is copied below:

"SEC. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the State in which such person was proscribed."

This section of the Revised Statutes originated in the Act of April 14, 1802, c. 28, 2 Stat. 153, 155. At that time adoption of children was not recognized in the statutory laws of England, or of the United States, or of any State, Territory or possession of the United States. It was unknown to the

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common law. *Schouler on Domestic Relations* (*6th ed.*) Sec. 719; *Spencer on Domestic Relations*, Sec. 464; *Sherman, Roman Law in the Modern World*, Sec. 496 *et seq.; Ross* v. *Ross*, 129 Mass. 243, 262; *Woodward's Appeal*, 81 Conn. 152, 162; *Matter of Thorne*, 155 N. Y. 140, 143; *Van Matre* v. *Sankey*, 39 Am. St. Repts. 196, 210 (Note).

As indicated by these authorities, adoption was practiced by some ancient peoples, including the Romans, and the principles of the Roman law, as modified by Justinian, were transmitted to the modern nations of Europe whose legal systems were based upon the Roman law. The Roman adoptions, however, are distinguishable from our modern ones. *Sohm, Institutes of Roman Law* (translation by Ledlie, 2d ed., 1901), pp. 499, *et seq.; Hunter, Roman Law* (3d ed., 1897), pp. 203, *et seq.* Two forms of adoption were recognized. One (*arrogatio*) comprehended only the adoption of persons *sui juris*. Adoption of children was also permitted but Sohm states: "*Datio in adoptionem*, according to Justinian's law, did not operate, in a general way, to produce the relations of father and child, but merely gave the adopted child the same rights of succession in respect of the estate of his adoptive father as he would have had if he had been a real child of the latter." Such an adoption with the fullest effect (*adoptio plena*) was permitted only to a natural ascendant (e. g. the grandfather) of the adopted child. Women were not permitted to adopt.

The Code Napoleon (Arts 343, *et seq.*) permitted adoptions by persons more than fifty years of age without legitimate descendants, with other qualifications and exceptions, but required that the person to be adopted must have reached his majority (twenty-one years) and further provided: "The faculty of adoption shall not be exercised except towards an individual, for whom, during minority, and for a period of at least six years, the party shall have supplied assistance, and employed uninterrupted care, or towards one who shall have saved the life of the party adopting, either in a fight, or in rescuing him from fire or water."

Aside from the established principles of statutory construction which would apply and require the same conclusion if the matter were doubtful, the 1802 statute shows upon

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its face that the Congress contemplated no such adoptions as those practiced in Europe and described in the Napoleonic Code because such adoptions could not be made until the person adopted had reached the age of twenty-one years or more, whereas the statute specifically dealt with "children" under twenty-one years of age. Furthermore, it could not have contemplated adoptions as known in this country today because they are dependent upon local statutes enacted from time to time during a period beginning half a century later. *Woodward's Appeal*, *Ross* v. *Ross*, *Sherman's Roman Law*, *supra.*

In 1802, of course, one might have had the care and custody of a child other than his own (involving guardianship, which differs fundamentally from adoption), and the Act of April 14, 1802, specifically recognized this. In Section 2 thereof, requiring registration of arriving immigrants for use in subsequent naturalization proceedings "as evidence of the time of * * * arival within the United States," it was provided that minors should be registered by "parent" or "guardian."

However, the provision in Section 4 for derivative citizenship of minors was restricted to "children," upon naturalization of their "parents." Neither the context nor sound reasoning would permit interpreting the word "parent" in Section 4 as including also the "guardian" mentioned in Section 2. The "child" obtained derivative citizenship upon the naturalization of his "parent," who had registered him, but naturalization of the ward required an affirmative proceeding. Subsequently, the Act of May 26, 1824, c. 186, 4 Stat. 69, provided a special naturalization procedure for "any alien, being a free white person and a minor, under the age of twenty-one years," waiving the requirement of registration upon arrival, which was construed as not affecting the provision for derivative citizenship of "children" and was, therefore, peculiarly applicable to alien minors in the country without their natural parents.

The insertion of Section 4 of the Act of April 14, 1802, in the Revised Statutes neither added to nor subtracted from its original scope and meaning (*United States* v. *Le Bris*, 121 U. S. 278, 280), and certainly its words did not acquire

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a broader meaning because many years after its enactment local statutes, passed from time to time, have provided for the adoption of children. In fact, it cannot be said even today that "children" necessarily includes adopted children; and the cases to which I have been referred indicate that the courts have reached varying conclusions, depending, of course, on the particular facts and circumstances.

Concerning the probable reason for the 1907 statute and its effect upon the earlier law, the Circuit Court of Appeals for the Second Circuit pointed out, in *United States* v. *Tod*, 297 Fed. 385, 392:

"The courts had been unanimous in holding that, if a foreign-born minor child was dwelling in the United States at the time of the naturalization of the parent, the child, under R. S. U. S. Sec. 2172, became thereby naturalized. The statute in that regard was not ambiguous or doubtful, and did not need correction or amendment. The difficulty in construing the statute arose in the case of a minor child born outside of the United States, who came here after the naturalization of the parent, and it was to correct this difficulty and impose a more rigid restriction that section 5 of the Act of March 2, 1907, was enacted.

"Giving to the two statutes under consideration this interpretation, we have a simple system under which each statute confers rights in two different situations. Under R. S. U. S. Sec. 2172, a foreign-born minor child dwelling in the United States at the time of the naturalization of the parent automatically becomes an American citizen. Under section 5 of the Act of March 2, 1907, a foreign-born child, not in the United States when the parent is naturalized, becomes a citizen only from such time as, while still a minor, it begins to reside permanently in the United States."

This case was cited with approval in *Kaplan* v. *Tod*, 267 U. S. 228, 230, with some indication that the Supreme Court accepted the same view of the matter.

It will be observed that Section 5 of the 1907 statute deals with "a child born without the United States of alien parents" and provides that he shall be deemed a citizen by virtue of the naturalization of, or the resumption of American citizenship by, "the parent," which latter words may

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be considered as referring antecedently to one of the previously mentioned parents of whom he was born, thereby excluding an adoptive parent. Certainly there is no apparent reason for giving to the word "child" a broader significance in this respect than it had in the previously existing law; and no one has suggested it. The argument has been only that the word should not be interpreted more narrowly.

The Act of May 24, 1934, c. 344, 48 Stat. 797, purposed to insure equality between the sexes in citizenship matters, effected a change in phraseology in this section so that it now provides that a "child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by *the father or the mother*." The House Committee on Immigration and Naturalization explained the change (H. Rept. 131, 73d Cong. 1st Sess.) as intended to remove any doubt "that naturalization of an alien mother will confer United States citizenship upon her minor children born abroad." I have not considered whether the law as it stood prior to this amendment would or would not have conferred citizenship upon a child by virtue of the naturalization of the mother. It is sufficient for present purposes that the statute did not, and does not now, confer derivative citizenship upon adopted children.

It is true that under our *immigration laws* today an adopted child may in some circumstances be deemed a "child" of an adoptive parent. This is by virtue of the following express provision in Section 28 of the Immigration Act of 1924 (c. 190, 43 Stat. 153, 168); "As used in this Act * * * the terms 'child,' 'father,' and 'mother,' do not include a child or parent by adoption unless the adoption took place before January 1, 1924." Miss S, it will be noted, was adopted prior to January 1, 1924, but even if we should conclude that she is to be deemed a "child" of her adoptive mother within the contemplation of the Immigration Act of 1924 it does not thereby follow that she is such a "child" within the contemplation of other and separate statutes relating to citizenship. There is a material difference between the right of an alien minor to enter the country and his right to claim citizenship through the naturalization of another.

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Considering the foregoing, it is my opinion that Miss S is not to be deemed a citizen of the United States by virtue of the naturalization of her adoptive mother. In reaching this conclusion I have had the benefit of strongly conflicting views, but the Supreme Court of the United States has said, in *United States* v. *Manzi*, 276 U. S. 463, 467: "Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant."

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF STATE.

CONSTRUCTION OF HIGHWAY AND PARK WAY BETWEEN SHENANDOAH AND GREAT SMOKY MOUNTAINS NATIONAL PARKS

The construction of the proposed highway and park way connecting the Shenandoah and Great Smoky Mountains National Parks is authorized under Title II of the National Industrial Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935; and under these statutes and Executive order of June 7, 1935, the National Parks Service of the Interior Department is authorized to perform the work as heretofore designated by the Public Works Administration with the approval of the President.

DEPARTMENT OF JUSTICE,
June 20, 1935.

SIR: I have your letter of June 12, requesting my opinion in connection with the construction of a proposed highway and park way to connect the Shenandoah and Great Smoky Mountains National Parks. As a result of conferences between representatives of our respective Departments, I understand that the specific questions upon which you desire my opinion may be stated as follows:

"1. Is there authority under Title II of the National Industrial Recovery Act, as extended by section 12 of the Emergency Relief Appropriation Act of 1935, to build up the proposed highway and park way, assuming that the necessary lands have been conveyed to the United States and title thereto approved by the Attorney General?

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"2. Is it permissible under Title II of the National Industrial Recovery Act, as extended by section 12 of the Emergency Relief Appropriation Act of 1935 and the Executive Order of June 7, 1935, for the National Parks Service of the Interior Department to perform the work as heretofore designated by the Public Works Administration with the approval of the President?"

It is contemplated that the land will be acquired and conveyed to the United States by North Carolina and Virginia at their own expense and that the United States will thereupon undertake the necessary construction work.

Title II of the National Industrial Recovery Act (48 Stat. 201), authorized the Administrator of Public Works, under the direction of the President to prepare "a comprehensive program of public works, which shall include among other things * * * construction, repair, and improvement of public highways and park ways." I understand that the project contemplated is a "highway and park way"—a public road with adjacent park areas—and I know of no fact which would distinguish it from the "highways and park ways" mentioned in the statute. The documents transmitted with your letter indicate that it was, in fact, included in the comprehensive program and approved by the President, as provided.

Pursuant to the further provisions authorizing the President, acting "through the administrator or through such other agencies as he may designate" (which includes the National Parks Service), to construct the projects included within the program, the National Parks Service was designated to carry out the project and the sum of $4,000,000 was allotted to it for such purpose under date of December 5, 1933. A further sum of $2,000,000 was allotted under date of July 18, 1934. The states of North Carolina and Virginia have undertaken the acquisition of the necessary land. The actual construction work, however, has not yet commenced, and the matter is now affected by the following provisions contained in Section 201 (d) of the National Industrial Recovery Act:

"After the expiration of two years after the date of the enactment of this Act, or sooner if the President shall by

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proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended, the President shall not make any further loans or grants or enter upon any new construction under this title, and any agencies established hereunder shall cease to exist and any of their remaining functions shall be transferred to such departments of the Government as the President shall designate * * *." [48 Stat. 201.]

Assuming, however, that the actual building of the road will represent "new construction," within the contemplation of the words as used in the foregoing statute, the following provisions of Section 12 of the Emergency Relief Appropriation Act of 1935 are applicable:

"The Federal Emergency Administration of Public Works established under Title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purposes of said Act shall be available until June 30, 1937."

Pursuant to the foregoing authority the President, by Executive Order of June 7, 1935, authorized the Federal Emergency Administration of Public Works "to continue after June 16, 1935, to perform all of the functions which it was authorized to perform prior to June 16, 1935, under Title II of the National Industrial Recovery Act," and further provided:

"The unobligated balances on June 30, 1935, of allotments of funds made pursuant to Title II of the National Industrial Recovery Act, approved June 16, 1933, to departments and agencies of the Government which continue to exist after June 16, 1935, for the performance of functions of the Federal Emergency Administration of Public Works, are hereby reallocated for use by said departments and agencies respectively, after June 30, 1935, for the purposes for which originally allocated thereto: *Provided*, That upon completion of the project or work any unexpended balances of the aforesaid reallocations shall be reported by the departments or agencies concerned to the Secretary of the

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Treasury who will cause such balances to be placed to the credit of the appropriations from which said allotments were made."

Section 12 of the Emergency Relief Appropriation Act of 1935 specifically authorized only the Federal Emergency Administration of Public Works to continue to perform its functions under the National Industrial Recovery Act, which was necessary because without such express provision the Public Works Administration would have ceased to exist on June 16, 1935. It further provided, however, that all funds theretofore appropriated for the purposes of the National Industrial Recovery Act should remain available until June 30, 1937; and the Congress, of course, had knowledge that the Public Works Administration had not been charged with the sole and actual execution of all the projects for which the appropriation was available.

The Executive Order of June 7, 1935, has previously been approved by me as to form and legality. The provision therein that the unobligated balances of allotments previously made to the permanent Departments and agencies of the Government "are hereby reallocated for use by said Departments and agencies * * * for the purposes for which originally allocated thereto," supplies the necessary authority for the execution of the project under consideration by the National Parks Service in accordance with the previous designation and allotment of funds.

Considering the foregoing, it is my opinion that there is authority under Title II of the National Industrial Recovery Act, as extended by Section 12 of the Emergency Relief Appropriation Act of 1935, to construct the proposed highway and park way, and that the National Parks Service of the Interior Department is authorized by these statutes and the Executive Order of June 7, 1935, to perform the work under the designations and allotments herein mentioned.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

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VALIDITY OF PROPOSED REGULATIONS PERTAINING TO ESTABLISHMENT AND OPERATION OF FOREIGN TRADE ZONES IN PORTS OF ENTRY

The board created by the Act of June 18, 1934, 40 Stat. 998, authorizing the establishment, operation, and maintenance of foreign trade zones in ports of entry of the United States, has no power to extend by regulation the statutory provisions concerning penalties for violations of the act and regulations issued thereunder.

The board is without authority to revoke grants made by it for establishing and maintaining trade zones because of repeated and willful violations of its regulations, but may revoke such grants only for such violations of the act itself.

DEPARTMENT OF JUSTICE,
June 25, 1935.

SIR: I have your letter of June 19, 1935, requesting my opinion as to the validity of the following paragraphs, which the Treasury Department has suggested should be included in the regulations to be issued by the Secretary of the Treasury, the Secretary of War, and the Secretary of Commerce, as the Board constituted under the Act of June 18, 1934, c. 590, 48 Stat. 998, authorizing the establishment, operation, and maintenance of foreign trade zones in ports of entry of the United States:

"200 (i) To revoke the grant of any corporation after due notice and public hearing for repeated and willful violations of the act, *or of these regulations;*

"1201.—Revocation of Grant. In the event of repeated willful violations by the grantee of any of the provisions of the act *or of these regulations*, the Board may revoke the grant after four months' notice to the grantee and after affording it an opportunity to be heard. The testimony taken before the Board shall be reduced to writing and filed in the records of the Board, together with the decision reached thereon."

The question concerns only the italicized language relating to violations of *regulations*.

The following paragraphs of the statute have been cited as pertinent:

"SEC. 2. (a) The Board is hereby authorized, subject to the conditions and restrictions of this Act and of the rules

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and regulations made thereunder, upon application as hereinafter provided, to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States (48 Stat. 999).

"SEC. 18. (a) In the event of repeated willful violations of any of the provisions of this Act by the grantee, the Board may revoke the grant after four months' notice to the grantee and affording it an opportunity to be heard. The testimony taken before the Board shall be reduced to writing and filed in the records of the Board together with the decision reached thereon.

"SEC. 19. In case of a violation of this Act, or any regulation under this Act, by the grantee, any officer, agent, or employee thereof responsible for or permitting any such violation shall be subject to a fine of not more than $1,000. Each day during which a violation continues shall constitute a separate offense."

Subsections (b) and (c) of Section 18 authorize the Board to compel the attendance of witnesses, etc., and in connection therewith to invoke the aid of the District Courts of the United States; they also provide for appeals to the Circuit Courts of Appeals from orders of revocation issued by the Board.

It will be observed that the Congress has provided expressly for violations both of the statute and of the regulations, has distinguished between violation of one and violation of the other, and has prescribed different penalties—fines for violations of the regulations, fines and revocation of the grant for violations of the provisions of the statute, if willful and repeated; and I am aware of no principle under which we may imply from the authority, in another section, to make "rules and regulations not inconsistent with the provisions of this Act", the power to extend to violations of the regulations the additional penalty of revocation of the grant, which the statute has prescribed for violations only of the provisions of the Act itself. I think we are required to apply the maxim *expressio unius est exclusio alterius.*

The General Counsel of the Treasury Department has suggested that the language of Section 2 (a), *supra*, may be

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read as authorizing the Board to make grants upon conditions, which might include a condition for exercise of the privilege only during compliance with the regulations. I do not regard this suggested construction as authorized by the language of the section, particularly when it is read in the light of the provisions dealing with penalties and other sections of the statute. The grantee is required to operate the zone as a public utility and to maintain costly services, requiring large investments. Considering this, it is reasonable that only the more serious causes—repeated willful violations of the statute itself—should constitute ground for revocation.

Notwithstanding the language of the Act, it may be arguable that violation of the regulations is also violation of the statute because forbidden and made penal under Section 19 and, therefore, if willful and repeated, may afford cause for revocation under Section 18 (a); but, if this is true, it is dependent upon the statute itself.

Answering the specific question which you have submitted, it is my opinion that it is not within the power of the Board to extend by regulation the statutory provisions concerning penalties for violations and that, therefore, the italicized words of the suggested paragraphs, dealing with violations of regulations, as distinguished from violations of the provisions of the statute, as causes for revocation, are without legal effect.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF COMMERCE.

WAGE LAW APPLICABLE TO ALLEY DWELLING AUTHORITY FOR THE DISTRICT OF COLUMBIA

The Alley Dwelling Authority for the District of Columbia is subject to the wage provisions of the Act of March 3, 1931, c. 411, 46 Stat. 1494, as herein interpreted, and it is not subject to the wage provisions of section 206 of title II of the National Industrial Recovery Act; and any moneys which may be administratively allocated to the authority from funds appropriated by the Emergency Relief Appropriation Act of 1935 must be expended in accordance with the provisions of that act and Executive orders issued thereunder.

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The Act of March 3, 1931, is restricted to "construction, alteration, and/or repair", and this does not include the demolition of existing structures. The act applies only to contracts "in excess of $5,000 in amount" and only to "laborers and mechanics employed by the contractor or any subcontractor."

DEPARTMENT OF JUSTICE,
July 2, 1935.

SIR: I have the honor to comply with your request of May 17 for my opinion whether the Alley Dwelling Authority for the District of Columbia is required by the Act of March 3, 1931, c. 411, 46 Stat. 1494 (U. S. C., Title 40, Sec. 276 (a)), to pay "prevailing wages" in connection with the demolition, alteration and erection of buildings in inhabited alleys in the District of Columbia (1) when the work is done by contract and the amount of the contract exceeds $5,000, (2) when the work is done by contract and the amount of the contract is less than $5,000, (3) when the work is done by persons employed by the Authority; and whether the Authority is "subject to the same regulation in the matter of wages as is the Public Works Administration."

The Alley Dwelling Authority was created under the Act of June 12, 1934, c. 465, 48 Stat. 930, entitled "An Act to provide for the discontinuance of the use as dwellings of buildings situated in alleys in the District of Columbia, and for the replatting and development of squares containing inhabited alleys, in the interest of public health, comfort, morals, safety, and welfare, and for other purposes." The Act authorized the President, acting through the Authority, to acquire land and buildings in inhabited alleys, to replat lands so acquired, to demolish buildings situated thereon, to erect other buildings or structures as deemed advisable, and "to lease, rent, maintain, equip, manage, exchange, sell, or convey any such lands, buildings, or structures upon such terms and conditions as he may determine."

Section 3 contains the following provision for funds required by the Authority in the execution of its projects.

"SEC. 3. (a) The President is hereby authorized, in his discretion, to make immediately available to the Authority for its lawful uses and as needed, from the allocation made from the appropriation to carry out the purposes of the

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National Industrial Recovery Act, contained in the Fourth Deficiency Act, fiscal year 1933, now carried under the title, 'National Industrial Recovery, Federal Emergency Administration of Public Works, Housing, 1933–1935,' symbol 03/5666, not to exceed $500,000 of any amount thereof dedicated for low-cost housing and slum-clearance projects in the District of Columbia, to be set aside in the Treasury and be known as 'Conversion of inhabited alleys fund' (hereinafter referred to as the 'fund').

"(b) The Authority is hereby authorized and empowered to borrow such moneys from individuals or private corporations as may be secured by the property and assets acquired under the provisions of this Act, and such moneys, together with all receipts from sales, leases, or other sources, shall be deposited in the fund and shall be available for the purposes of this Act.

"(c) The fund shall remain available until June 30, 1935, and thereafter shall be available annually in such amount as may be specified in the annual appropriation Acts."

The Act of March 3, 1931, entitled "An Act Relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes," provides as follows:

"That every contract in excess of $5,000 in amount, to which the United States or the District of Columbia is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration, and/or repair of any public buildings of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, shall contain a provision to the effect that the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State in which the public buildings are located, or in the District of Columbia if the public buildings are located there, and a further provision that in case any dispute arises as to what are the prevailing rates of wages for work of a

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similar nature applicable to the contract which can not be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract * * *."

When this measure was under consideration in the House of Representatives it was pointed out that efforts had been made by administrative officers, through the insertion of provisions in public contracts, to prevent the payment of unduly low rates of wages by contractors on Government building projects, involving the bringing into communities of what was termed "cheap, bootleg labor." The Comptroller General, however, had required the elimination of such provisions, and the bill was purposed to remove the objections which he had raised (74 Cong. Rec. 6505 *et seq.*)

Mr. Bacon, explaining the bill, referred to it as comprehending court houses, Customs Houses, post office buildings, hospitals and additions to hospitals for the Veterans Bureau, the Public Health Service, the Army and the Navy, "additional Army and Navy building projects of every character, etc."—"all building constructions carried on by the Government"—but not "river and harbor work, or road construction" (74 Cong. Rec. 6511, 6512, 6513). Mention was made of "an extensive public building program" then under way (See also S. Rept. 1445, 71st Cong., 3d Sess.), but there was no indication of any purpose to limit the application of the statute to buildings within that program or to buildings of similar nature.

Following enactment of the statute the question was raised whether its provisions would apply to an administration building, a dormitory, a garage and small houses for Government employees temporarily required in connection with the construction of the Hoover Dam, which buildings, it was stated, "would not be of the permanent type usual in the case of public buildings of the United States designed for permanent occupancy and for the transaction of permanent Government business." The Comptroller General held that the statute applied (10 Comp. Gen. 461), and cited in connection therewith a prior opinion (6 Comp. Gen. 619) which indicates that temporary sheds for sheltering animals and equipment, and portable houses for temporary use of field

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employees, have been considered as within the provisions of Section 3733 R. S. concerning contracts "for the erection, repair, or furnishing of any public building, or for any public improvement."

Upon informal inquiry at several of the Departments and offices of the Government which have engaged in various kinds of building projects since passage of the Act of March 3, 1931, I have learned of no instance of a building administratively regarded as beyond the purview of this statute when erected under contract save buildings constructed with funds appropriated for relief purposes and affected by the later and special provisions concerning rates of wages which are hereinafter discussed.

I approve the broad construction which has thus been placed upon the statute and regard it as supported both by the language of the Act and by the apparent purposes intended to be accomplished. Under this view buildings erected with funds supplied by the Congress for the furtherance of public purposes are not to be distinguished, so as to affect the application of the statute, upon consideration of their character or the particular public purpose which their building is intended to further; nor do I regard it as controlling that some of them will be, or may be, conveyed for a consideration to private persons at some time after completion.

The statute is restricted by its terms to "construction, alteration, and/or repair", and this does not include the demolition of existing structures. I reserve, however, the question (not now before me) of a razing or clearing operation provided for in a building contract, to be performed by the contractor as an incident of the building project.

It is also to be noted that the statute, by express language, applies only to contracts "in excess of $5,000 in amount" and, furthermore, applies only to "laborers and mechanics employed by the contractor or any subcontractor." Mr. Bacon, when explaining the measure to the House of Representatives, observed: "This bill declares the policy of the administration, and I think they will be morally bound, in carrying out this policy, to do themselves what they require others to do." He stated, however, in response to a specific inquiry, that the bill would not apply to work performed on a

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military reservation "by purchase and hire by the quartermaster" rather than under contract (74 Cong. Rec. 6513).

As hereinbefore mentioned, some statutes subsequent to the Act of March 3, 1931, have made express provision for rates of wages on government projects and, to the extent of their application, they supersede the earlier law. Such a provision is contained in Section 206 of the National Industrial Recovery Act, under Title II, relating to "Public Works and Construction Projects," and, in so far as here pertinent, reads as follows:

"SEC. 206. All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure * * * that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort * * *." [48 Stat. 204.]

The moneys of the Alley Dwelling Authority came originally from the Public Works Fund, as above pointed out. However, the transfer to the Alley Dwelling Authority of $500,000 of the Public Works Fund, by direction of the Congress contained in the Act creating the Alley Dwelling Authority, which was later in time than the National Industrial Recovery Act and entirely separate and distinct therefrom, was not a "loan" or "grant" "pursuant to this title," within the meaning of the quoted words as used in Section 206, *supra*, but amounted to a rededication, or reappropriation, of the sum by the Congress for use in accordance with the provisions of the Act creating the Alley Dwelling Authority; and, likewise, contracts affecting it, made by the Authority pursuant to the provisions of the later Act, are not "contracts let for construction projects * * * pursuant to this title" (Title II of the National Industrial Recovery Act). *A fortiori*, the quoted words from the National Industrial Recovery Act do not comprehend contracts involving funds which the Authority is authorized to borrow from individuals or private corporations.

In my opinion, therefore, the application of the Act of March 3, 1931, to projects of the Alley Dwelling Authority is not affected by the provision concerning wages in Section 206 of the National Industrial Recovery Act.

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I am informed that the Alley Dwelling Authority has requested an allocation of moneys from the fund provided in the Emergency Relief Appropriation Act of 1935, and I have taken up this phase of the matter with the Honorable Harry L. Hopkins, Works Progress Administrator, in accordance with the suggestion contained in your memorandum. I approve the view, stated by Mr. Hopkins, that if any of the moneys appropriated by this Act are administratively allocated to the Authority their expenditure will be subject to the provisions of the 1935 statute and executive orders, issued under Section 7 thereof, prescribing rates of wages.

In conclusion, it is my opinion that the Alley Dwelling Authority is subject to the provisions of the Act of March 3, 1931, interpreted as herein indicated, and is not subject to the provision concerning wages in Title II of the National Industrial Recovery Act; but that any moneys which may be administratively allocated to it from the fund provided in the Emergency Relief Appropriation Act of 1935 must be expended in accordance with the provisions of that Act and Executive orders issued thereunder.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

ELECTION OF OFFICERS FOR THE GOVERNMENT OF THE COMMONWEALTH OF THE PHILIPPINES

The language of section 4 of the Act of March 24, 1934, 48 Stat. 458, requiring "a proclamation for the election of officers for the Government of the Commonwealth of the Philippine Islands provided for in the constitution" does not contemplate an election of provincial and municipal officers.

DEPARTMENT OF JUSTICE,
July 3, 1935.

SIR: I have your letter of June 26, requesting my opinion upon a question which has arisen in connection with the proclamation of the Governor General of the Philippine Islands for an election under Section 4 of the Act of March 24, 1934, c. 84, 48 Stat. 456, 458.

The question requires the consideration of the following provisions of the statute and of the recently-adopted Philippine Constitution.

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The Statute:

"SEC. 4. * * * If a majority of the votes cast shall be for the constitution, such vote shall be deemed an expression of the will of the people of the Philippine Islands in favor of Philippine independence, and the Governor General shall, within thirty days after receipt of the certification from the Philippine Legislature, issue a proclamation for the election of officers of the government of the Commonwealth of the Philippine Islands provided for in the constitution. The election shall take place not earlier than three months nor later than six months after the proclamation by the Governor General ordering such election. When the election of the officers provided for under the constitution has been held and the results determined, the Governor General of the Philippine Islands shall certify the results of the election to the President of the United States, who shall thereupon issue a proclamation announcing the results of the election, and upon the issuance of such proclamation by the President the existing Philippine government shall terminate and the new government shall enter upon its rights, privileges, powers, and duties, as provided under the constitution. * * *

* * * * *

"SEC. 15. Except as in this Act otherwise provided, the laws now or hereafter in force in the Philippine Islands shall continue in force in the Commonwealth of the Philippine Islands until altered, amended, or repealed by the Legislature of the Commonwealth of the Philippine Islands or by the Congress of the United States, and all references in such laws to the government or officials of the Philippines or Philippine Islands shall be construed, insofar as applicable, to refer to the government and corresponding officials respectively of the Commonwealth of the Philippine Islands. The government of the Commonwealth of the Philippine Islands shall be deemed successor to the present government of the Philippine Islands and of all the rights and obligations thereof. Except as otherwise provided in this Act, all laws or parts of laws relating to the present government of the Philippine Islands and its administration are hereby repealed as of the date of the inauguration of the government of the Commonwealth of the Philippine Islands."

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The Constitution:

"ART. VI.—LEGISLATIVE DEPARTMENT.

"SECTION 1. The Legislative power shall be vested in a National Assembly. The Members of the National Assembly shall not exceed one hundred and twenty, shall be chosen every three years, and shall be apportioned among the several provinces as nearly as may be according to the number of their respective inhabitants, but each province shall have at least one Member. The National Assembly shall by law make an apportionment within three years after the return of every enumeration, and not otherwise. Until such apportionment shall have been made, the National Assembly shall consist of ninety-eight Members, of whom eighty-seven shall be elected by the representative districts as now provided by law; and three by the Mountain Province, and one by each of the other eight existing special provinces. The Members of the National Assembly in the provinces of Sulu, Lanao, and Cotabato shall be chosen as may be determined by law; in all other provinces they shall be elected by the qualified voters therein.

* * * * *

"ART. VII.—EXECUTIVE DEPARTMENT.

"SECTION 1. The Executive power shall be vested in a President of the Philippines.

"SEC. 2. The President shall hold his office during a term of six years, and together with the Vice-President chosen for the same term, shall be elected by direct vote of the people. * * *

* * * * *

ART. XV.—TRANSITORY PROVISIONS.

"SECTION 1. The first election of the officers provided in this Constitution and the inauguration of the Government of the Commonwealth of the Philippines shall take place as provided in Public Act Numbered One hundred and twenty-seven of the Congress of the United States, approved March twenty-four, nineteen hundred and thirty-four.

"SEC. 2. All laws of the Philippine Islands shall continue in force until the inauguration of the Commonwealth of the Philippines; thereafter, such laws shall remain operative, unless inconsistent with this Constitution, until amended, altered, modified, or repealed by the National Assembly, and

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all references in such laws to the Government or officials of the Philippine Islands shall be construed, in so far as applicable, to refer to the Government and corresponding officials under this Constitution.

* * * * *

"SEC. 4. All officers and employees in the existing Government of the Philippine Islands shall continue in office until the National Assembly shall provide otherwise, but all officers whose appointments are by this Constitution vested in the President shall vacate their respective offices upon the appointment and qualification of their successors, if such appointment is made within a period of one year from the date of the inauguration of the Commonwealth of the Philippines."

The Governor-General has issued a proclamation as indicated by the following excerpt from a radiogram addressed to you under date of June 17:

"Have issued Proclamation for election September 17th of officers provided for in Constitution. According to opinion this office and Secretary Justice this applies only to President, Vice President and ninety-eight members National Assembly. Constitutional Article 15, Section 4, seems to leave provisions for election local officials to National Assembly. * * *"

The Judge Advocate General of the Army, in an opinion submitted to me with your letter, accepts the view of the Governor-General and of the Secretary of Justice. On the other hand, the Governor-General states it has been urged that the law contemplates a complete change and requires a general election of all officers, including provincial and municipal officers.

The Philippine Constitution provides for no elective officers except the President, the Vice President and the members of the National Assembly. Members of the judiciary and executive officers other than the President and Vice President are to be appointed.

Provincial and municipal governments are not provided for in the Constitution; and it is noteworthy that they are not provided for in the Organic Act (U. S. C., Title 48, Sec. 1001 *et seq.*), under which the present insular government is organized. They have existed under local law, and

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many acts of the Philippine legislature, passed from time to time, have concerned them. The Federal statutes have recognized their existence, but have clearly distinguished them from "the Government of the Philippine Islands," established under the Organic Act. For example, the provision for payment of salaries of "officials of the Philippines" from the "revenues of the Philippines" is followed by a provision that "provincial and municipal officials * * * shall be paid out of the provincial and municipal revenues in such manner as the Philippine legislature shall provide." (U. S. C., Title 48, Secs. 1124, 1125.)

It was a reasonable assumption that the Congress had in mind this distinction when providing in the later Act for a Constitution and for a "government of the Commonwealth of the Philippine Islands," which "shall be deemed successor to the present government of the Philippine Islands and of all the rights and obligations thereof," and this view was apparently accepted and acted upon in the framing of the Constitution. I have already concluded, in my opinion to you of March 11, 1935 [38 Op. 197], that the Constitution which has been adopted substantially conforms with the requirements of the statute.

For the foregoing reasons it is my opinion that the language in the Act of March 24, 1934, requiring "a proclamation for the election of officers of the government of the Commonwealth of the Philippine Islands provided for in the Constitution," does not contemplate an election of provincial and municipal officers.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

PAYMENT OF BURIAL EXPENSES OF ENLISTED MEN WHO DIE WHILE ABSENT WITHOUT AUTHORITY

A soldier temporarily absent without authority, particularly in the absence of facts showing that he is a deserter, is properly considered as "in active service" or "on the active list" within the meaning of the Act of March 9, 1928, 45 Stat. 251, authorizing appropriations for burial expenses of enlisted men who die in active service, etc.

The term "on active duty" distinguished from the terms "in active service" and "on the active list."

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DEPARTMENT OF JUSTICE,
July 8, 1935.

SIR: I have your letter of June 12, 1935, in which you refer to the Act of March 9, 1928, 45 Stat. 251 (U. S. C., Title 10, Sec. 916), authorizing the appropriation from time to time of such sums as may be necessary for the burial expenses of "enlisted men who die in active service" and for reimbursement of individuals who have borne the burial expenses of "enlisted men of the Army who die on the active list", and request my opinion whether a soldier absent without authority may be considered as "in active service" or "or the active list" within the meaning of that Act.

It appears from your letter and enclosure that the Comptroller General, in a decision of December 14, 1922 (2 Comp. Gen. 380), rejected a claim for reimbursement for the burial expenses of an enlisted man who committed suicide while absent without leave, interpreting the above quoted language, used in the Appropriation Act of March 4, 1921, 41 Stat. 1386, as not including periods of absence without authority.

In a recent case involving a death occurring during a three-day period of absence without leave the Comptroller General reached the same conclusion respecting the same language as used in the Act of March 9, 1928, *supra*, which is expressly referred to in the Appropriation Act for the fiscal year 1935 in connection with the appropriation for the recovery of bodies and disposition of remains of military personnel and civilian employees of the Army. In this case the Comptroller General held that a soldier absent without authority from his proper station at the time of death was not on the active list of the Army and that payment of burial expenses in such cases from public funds would not be authorized.

In this situation the Quartermaster General has recommended that the Army regulations (A. R. 5-280, September 6, 1927), which authorize the payment of burial expenses of the remains of deceased regular Army personnel "on the active list" and of retired personnel who die "while on active duty" and certain others not here material, be amended so as to provide that "the payment of burial ex-

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penses for personnel absent without leave at the time of death is not authorized", in order to bring the regulations into agreement with the rulings of the Comptroller General. In this connection you state that it is the opinion of the Judge Advocate General that the term "active service" denotes the active status as distinguished from the reserve status and the retired status, and that a soldier absent without leave, but not a deserter, is "in active service" within the meaning of that term as used in the Act. Since the views of the War Department are at variance with those of the Comptroller General upon the proper interpretation of the statute in question, my opinion is requested, not in connection with any pending case, but for the purpose of aiding you in determining whether the Army Regulations should be amended in the manner above indicated.

As you state, the opinion of Attorney General Stone of July 26, 1924 (34 Op. 228), interpreted the terms "active service", used in the Adjusted Compensation Act of 1924, as including periods of absence without leave (but not desertion) for the purpose of determining the amounts of adjusted compensation provided by that statute. While it does not follow that the same words must receive the same interpretation in other and separate statutes, there is nothing in the context of the Act under consideration which would indicate that the term as used therein should be given a different meaning.

The distinction between the terms "active service" and "active list" as used in the Act has no important bearing upon the question under consideration. The term "active list" relates only to the active list of the regular Army, while the term "in active service" is broader and includes not only personnel on the active list of the regular Army but also those on the retired and reserved lists who are in an active duty status.

There is, however, an important distinction between being "on active duty" and being "in active service" or "on the active list." The former denotes the physical presence of the soldier at his proper station while the latter denotes his status in the army.

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It is generally conceded that a soldier cannot voluntarily withdraw from the service by absenting himself from duty, but such absence may result in separation if the absentee is convicted of desertion. Under the present army regulations the entry "absent without leave" is changed to "desertion" when the Company Commander determines after investigation that such absence is coupled with intention on the part of the absentee not to return.

It follows, therefore, that absence without leave amounts only to absence from "active duty" unless the facts justify an entry of desertion. Such absence would affect the active service status only when the state of desertion is finally established by conviction or death.

It is clear from the language employed that the Congress did not intend to restrict the benefits of the Act only to those enlisted men who die while on active duty. That such a narrow interpretation may lead to absurd results is manifest if it be considered, for example, that a soldier killed in barracks while momentarily late for formation would thereby forfeit the right of burial at Government expense.

It is, therefore, my opinion that a soldier temporarily absent without authority, particularly in the absence of facts to support a conclusion that he did not intend to return and thus require his name to be dropped from the rolls as a deserter, would properly be considered "in active service" or on the "active list" within the meaning of the Act of March 9, 1928.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

VALIDITY OF PROPOSED BOND ISSUE OF THE GOVERNMENT OF PUERTO RICO

The proposed bond issue of the Government of Puerto Rico in the amount of $120,000 for financing the extension of an irrigation system now in operation is authorized under the acts and Executive order cited herein. The form of bond submitted complies with the law and the determinations of the Treasurer of Puerto Rico approved by the Governor.

The bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Puerto Rico.

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DEPARTMENT OF JUSTICE,
July 9, 1935.

SIR: I have your letter of July 2, stating that your Department has been authorized to sell for the account of the Government of Puerto Rico bonds of the face value of $120,000, the proceeds of which are to be used in the construction of necessary works for the extension of, and purchase of equipment for, an irrigation system now in operation.

It is proposed to issue the bonds under authority contained in Section 3 of the Act of Congress approved March 2, 1917, entitled "An Act to provide a civil government for Puerto Rico, and for other purposes", as amended by the Act of March 4, 1927, c. 145, 39 Stat. 951, 953; c. 503, 44 Stat. 1418 (U. S. C., Title 48 secs. 741, 745), and Act No. 46 of the Legislature of Puerto Rico, approved May 12, 1934, as modified by Executive Order No. 6726 of May 29, 1934, issued under authority contained in the Act of Congress of March 3, 1933, 47 Stat. 1489, 1517, providing for reorganizations within the executive branch of the Government.

You state that they are to be issued in coupon form, in the denomination of $1,000 each, to be dated July 1, 1935, and to bear interest at the rate of 3½ per centum per annum, payable at the Treasury of the United States semi-annually on January 1 and July 1 of each year, the principal thereof to be payable July 1, 1965, reserving, however, to the People of Puerto Rico the right to redeem all or any number of the said bonds at par, with accrued interest, on January 1, 1945, or on any interest payment date thereafter, upon giving sixty days' notice as provided by the Act of the Legislature of Puerto Rico. A copy of the form of the proposed bond was submitted with your letter.

Section 3 of the Act of March 2, 1917, as amended, provides:

"* * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Puerto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however*, That no public indebtedness of Puerto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valua-

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tion of its property * * *. In computing the indebtedness of the people of Puerto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Puerto Rico has heretofore been pledged and bonds issued by the people of Puerto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Puerto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Puerto Rico is pledged shall be counted."

Your letter and the documents submitted by you show that the aggregate assessed valuation of real and personal property in Puerto Rico on April 15, 1935, amounted to $291,263,097, that on the said date there were outstanding bonds of the Government of Puerto Rico of the face value of $27,914,000, and notes evidencing temporary loans of the face value of $657,494.54, that since the amendatory act of March 4, 1927, the good faith of the people of Puerto Rico has been pledged to the payment of principal and interest on outstanding municipal bonds aggregating $1,235,500, which under the statute must be added to the foregoing, making a total of $29,806,994.54. From this amount, however, there is to be deducted $982,583.33, representing the amount accumulated in the various sinking funds, pledged by statute and applicable only to the payment of unmatured obligations included in the foregoing total figures (35 Op. 9, 14; 37 id. 30, 32), making a net total of $28,824,411.21. A further deduction is claimed in the certificate of the Acting Treasurer of Puerto Rico because of present ownership by the insular Government of municipal bonds included in the foregoing figures. It is unnecessary for present purposes, however, to determine whether, or in what amount, the claimed deduction is authorized because, considering the last-mentioned figure ($28,824,411.21) as representing the present indebtedness of the Government of Puerto Rico, within the meaning of the Act of Congress, the contemplated issue will not increase this to an amount beyond 10 per centum of the aggregate of the assessed valuation, the maximum permitted by law; and this would be no more true if the suggested deduction were made.

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Sections 1 and 2 of the Act No. 46, *supra*, read as follows:

"SECTION 1. The Treasurer of Puerto Rico is hereby authorized, empowered and directed to issue bonds of The People of Puerto Rico in the sum of one hundred and twenty thousand (120,000) dollars pursuant to the terms hereinafter set forth. The proceeds from the sale of said issue of bonds shall be covered into the Irrigation Fund, and shall be applied by the Commissioner of the Interior to the construction of the necessary works and purchase of equipment for the enlargement, extensions and accessory installations in the irrigation system which was built and is in operation in accordance with the provisions of the Public Irrigation Law, approved September 18, 1908, and of later laws amendatory thereof, for the purpose of conveying irrigation water to the lands that may be included in the additional irrigation district which shall be formed, established and operated under the provisions of another act of the Legislature of Puerto Rico: *Provided*, That from said Irrigation Fund, thus increased with the addition of the proceeds from the said issue of bonds, there shall be reimbursed to the Special Fund for the Development and Use of the Water Power, the expenses which shall have been incurred in the investigations and field and office studies, preliminary surveys and preparation of topographic maps of the irrigable lands that may be considered for inclusion in the additional irrigation district hereinbefore mentioned, which studies, investigations and preparation of maps are being carried out, chargeable to said Special Fund, by engineers of the organization of utilization of the water resources as a thing related to the work that said organization has been conducting, through the physical connection existing between the Toro Negro Water Power Project under construction and the irrigation system of the South Coast of Puerto Rico.

"SECTION 2. That the said bonds may be in coupon or registered form, or both. The registered bonds shall be recorded and transferable in the Registry Office of the Treasury Department of the United States, Washington, District of Columbia. The coupon bonds may be made exchangeable for registered bonds under such rules as may be prescribed thereon. The bonds shall bear date of July first of the year

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of issue and shall bear interest at a rate not to exceed five (5) per cent a year, payable semi-annually on the first day of January and of July. The coupon bonds shall be of the denomination of one thousand (1,000) dollars each, and those issued as registered bonds shall be of the denomination of five thousand (5,000) dollars each. The bonds shall be redeemable within thirty (30) years from the date of issue in legal money of the United States of America: *Provided*, That the Government of Puerto Rico hereby reserves the option and the right to redeem all or any of the bonds authorized by this Act at par, with accrued interest, on any interest paying date, after the first ten years from the date of issue, by giving sixty days' notice of its intention, which notice shall be published in one or more newspapers of the City of New York, and in one or more newspapers of the Island of Puerto Rico, at least once a week during the said sixty days. Both principal and interest shall be payable in Puerto Rico, at the office of the Treasurer of Puerto Rico, or at the Treasury of the United States, in legal money of the United States of America."

The Act further provides that the bonds may be sold by the Secretary of War, or by the Treasurer of Puerto Rico, or by any fiscal agent appointed by the Treasurer, with the approval of the Governor, upon terms most advantageous to the People of Puerto Rico, as near the date of issuance as possible; and that the Treasurer with the approval of the Governor, under the limitations prescribed therein, shall have absolute intervention and authority in connection with all matters relating to said bonds. For the payment of both principal and interest the good faith of the People of Puerto Rico is irrevocably pledged.

The Executive order hereinbefore mentioned, which was issued under date of May 29, 1934, and transmitted to the Congress, as required by the Act of March 3, 1933, had the effect of modifying the Act of the Legislature so as to transfer from the Secretary of War to the Secretary of the Interior the authority to sell the bonds upon request by the Treasurer of Puerto Rico, with approval of the Governor.

Section 6 of Act No. 46 states that the bonds "shall be exempt from taxation" "in accordance with the provisions

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of Section 3" of the Act of Congress of March 2, 1917, *supra*, and purports to state those provisions but, probably through inadvertence, uses language less broad than the words of the federal statute. This, however, is immaterial because the exemption from taxation is dependent upon constitutional principles and legislation by the Congress. The bonds should properly recite, as is contemplated, that "under the provisions of Section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Puerto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia."

There was transmitted with your letter a statement signed by the Treasurer of Puerto Rico, setting forth his determinations in those matters left to his discretion, and this has been approved by the Governor, as provided in the Act of the Legislature. I find that all the statutory requirements have been complied with and that the form of bond submitted is in compliance with the law and the determinations of the Treasurer, approved by the Governor.

It is therefore my opinion that the bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Puerto Rico.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

LEGALITY OF A SINGLE BOND COVERING TWO TYPES OF ADVANCES UNDER DIFFERENT STATUTES

Two bonds are required to be given the United States, one of which is to be prescribed and approved by the Secretary of Agriculture, covering nonsubsistence expenses under the Act of June 3, 1902, 31 U. S. C., sec. 533, and the other to be prescribed and approved by the Secretary of the Treasury, covering subsistence expenses under the Subsistence Expense Act of 1926 and regulations issued thereunder.

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Held, there is no legal objection to the taking of a single bond containing separate conditions covering the two types of advances and providing definitely in connection with each the amount of the penalty applicable thereto, the bond being prescribed and approved by the Secretary of Agriculture and the Secretary of the Treasury, each with respect to his own separate responsibility.

DEPARTMENT OF JUSTICE,
July 16, 1935.

SIR: I have the honor to comply with your request of June 12 for my opinion upon a question thus stated in the opinion of your General Counsel, which accompanied your letter:

"Where two bonds are required to be given to the United States, one to be prescribed and approved by the Secretary of Agriculture covering non-subsistence expenses under the Act of June 3, 1902, 31 U.S.C. 533, and the other to be prescribed and approved by the Secretary of the Treasury covering subsistence expenses under the Subsistence Expense Act of 1926, 5 U.S.C. 828, and the Regulations issued pursuant thereto (Department Circular No. 369), is there any legal objection to the taking of a single bond containing separate conditions covering the two types of advances and containing provisions for the proration of the penalty of the bond covering each condition, assuming that the terms of the bond are mutually agreeable to, and the bond approved by, the heads of the two departments?"

During the latter part of 1932, the Comptroller General, in connection with the installation of a uniform system of disbursing accounts in the offices of Collectors of Internal Revenue, suggested that both the custodial and regular disbursing accounts of the Collectors be covered by a single bond in order to simplify accounting procedure. The Solicitor of the Treasury, in an opinion of January 21, 1933, held that the suggestion could not legally be carried out, relying largely upon the following cases: *United States* v. *Tingey*, 5 Pet. 115, 129; *United States* v. *Bradley*, 10 Pet. 343, 364; *United States* v. *Hodson*, 10 Wall, 395, 408; *Moses* v. *United States*, 166 U. S. 571, 586. These cases, it may be noted, hold that a bond exacted by an administrative officer which goes beyond the terms of the statute prescribing it is

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"an illegal bond," but that "where a bond contains conditions, some of which are legal and others illegal, and they are several and separable, the latter may be disregarded and the former enforced."

The matter was referred to the Attorney General, who concluded in an opinion of March 3, 1933, that "there is no objection to the use of single bonds for collectors of internal revenue, in proper form, to cover duties as disbursing agents for the Internal Revenue Service as well as duties as special disbursing agents in connection with custodial accounts, if the Secretary of the Treasury is satisfied that the amount and security of such single bonds are sufficient to protect the United States" (37 Op. 112).

The question on which you now ask my opinion differs from that considered in the opinion of March 3, 1933, principally in that the bonds which it is now proposed to consolidate are to be prescribed by the Secretary of Agriculture and the Secretary of the Treasury, respectively, whereas in the other case the Secretary of the Treasury was authorized to prescribe the bond required under each statute.

A proper degree of cooperation between Departments is both permissible and desirable, but there is a limit beyond which this cannot properly go without statutory authority. The head of one Department is not authorized to delegate to the head of another Department a discretion vested in him by statute; and it is but a corollary that a discretion vested in A is not to be exercised by A and B, for in such a case the law would no more have been followed than if the discretion had been vested in A and B but exercised by A alone.

However, I think it must be concluded that any reasonable objections upon such grounds are avoided when, as is here proposed, the consolidated bond, although for a single penal sum, provides that a definite amount shall be applicable for the faithful performance of one set of conditions and that another definite amount shall be applicable for the faithful performance of another set of conditions, separately set forth in distinct paragraphs—each officer prescribing and approving the instrument insofar as it relates to the duty imposed upon him by the applicable statute, and the total amount of

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the bond being but the sum of the separate amounts determined upon by the Secretary of Agriculture and by the Secretary of the Treasury, respectively. The practical effect in such circumstances is the same as if separate bonds had been given. There is no uncertainty as to the extent of liability, nor any exacting of conditions beyond those provided by statute, such as gave rise to the rulings in the cases hereinbefore mentioned.

It is therefore my opinion that there is no legal objection to a single bond, such as proposed, containing separate conditions covering the two types of advances and providing definitely in connection with each the amount applicable thereto, the instrument being prescribed and approved by the Secretary of Agriculture and by the Secretary of the Treasury, each with respect to his own separate responsibility.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

NECESSITY FOR CONFIRMATION OF APPOINTMENT OF DIRECTOR OF THE FEDERAL REGISTER DIVISION

The appointment provisions of section 1 of the Federal Register Act and section 2 of the Act of July 19, 1934, establishing the National Archives are not in conflict or inconsistent with each other.

If the salary of the director of the division set up in the National Archives Establishment for carrying out the purposes of the Federal Register Act is fixed at less than $5,000 a year, his appointment need not be confirmed by the Senate; but if fixed at $5,000 a year confirmation by the Senate is required.

DEPARTMENT OF JUSTICE,
August 13, 1935.

SIR: Reference is made to the letter of your Assistant Secretary, Mr. Marvin H. McIntyre, of August 9, 1935, in which my opinion is requested, on behalf of the Archivist of the United States, as to whether the appointment of the Director of the division set up in the National Archives Establishment for the purpose of carrying out the provisions of the Federal Register Act, approved July 26, 1935 (Public,

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No. 220, 74th Cong. [49 Stat. 500]), must be confirmed by the Senate in the event that the Director's salary is fixed (1) in an amount less than $5,000 a year, and (2) at precisely $5,000 a year.

Section 1 of the Federal Register Act, *supra*, provides:

"That the Archivist of the United States, acting through a division established by him in the National Archives Establishment, hereinafter referred to as the "Division", is charged with the custody and, together with the Public Printer, with the prompt and uniform printing and distribution of the documents required or authorized to be published under section 5. There shall be at the head of the Division a director, appointed by the President, who shall act under the general direction of the Archivist of the United States in carrying out the provisions of this Act and the regulations prescribed hereunder, who shall receive a salary, to be fixed by the President, not to exceed $5,000 a year."

By this section express provision is made that the Director of the division shall be appointed by the President at a salary of not to exceed $5,000 a year, but it is silent as to confirmation of such appointment by the Senate.

Secion 2 of the Act of June 19, 1934, establishing the National Archives, however, provides:

"All persons to be employed in the National Archives Establishment shall be appointed by the Archivist solely with reference to their fitness for their particular duties and without regard to civil-service law; and the Archivist shall make rules and regulations for the government of the National Archives; *but any official or employee with salary of $5,000 or over shall be appointed by the President by and with the advice and consent of the Senate*" [48 Stat. 1122]. [Italics supplied.]

In my opinion there is no inconsistency or conflict between the quoted provisions of these two sections in respect of the matter under consideration and they must be considered together. Since under the terms of the Federal Register Act the Director is necessarily an official of the National Archives Establishment, his appointment is subject to the requirement of Section 2 of the National Archives Act and must be confirmed by the Senate if his salary is fixed at $5,000.

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In view of the foregoing, it is my opinion that if the salary of the Director is fixed at less than $5,000 a year, his appointment need not be confirmed by the Senate; but if fixed at $5,000 a year, confirmation by the Senate is required.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

DUTY OF DISBURSING OFFICERS TO MAKE DISBURSEMENTS REQUIRED UNDER THE AGRICULTURAL ADJUSTMENT ACT

A ministerial officer may not question the validity of a statute which, so far as he is concerned, merely imposes upon him a proper duty and has no bearing upon his constitutional rights.

A ministerial officer cannot safely rely upon judicial decisions which have not become final and are not binding in jurisdictions other than those in which they are rendered, particularly if there is a conflict of decision, as in the instant case.

A decision of the Circuit Court of Appeals for the First Circuit is not binding as a rule of decision in the District of Columbia, where the disbursing officers herein concerned are located.

Notwithstanding the fact that the Circuit Court of Appeals for the First Circuit has held the Agricultural Adjustment Act to be unconstitutional in certain respects, pending decision of the Supreme Court on appeal or in the absence of a change in the act by the Congress, the disbursing officers of the Treasury should continue to make the disbursements required under the act.

DEPARTMENT OF JUSTICE,
August 16, 1935.

SIR: I have your letter of July 29 in which you call attention to the decision of the Circuit Court of Appeals for the First Circuit in *Butler et al.* v. *United States* (July 13, 1935, 78 F. (2d) 1), holding the Agricultural Adjustment Act to be unconstitutional (in part, at least), and request my opinion whether, in view of the implications in the opinion of the court, the Disbursing Officers of the Treasury are authorized to clear payments designed to apply on rental and benefit contracts made under the statute.

The Agricultural Adjustment Act provides for the imposition and collection of processing taxes. It also provides for certain contracts and for payments thereunder. The court held the statute to be unconstitutional, in so far at

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least as the tax provisions are concerned, although it is suggested that the language of the opinion indicates the view of the court that the provisions for the contracts and the payments thereunder are also invalid. Your question relates only to the duty of the Disbursing Officers, but the tax collectors, in the performance of their duties under the statute, are even more directly affected by the decision of the court.

Ordinarily, I think, it does not lie within the province of a ministerial officer to question the validity of a statute which, in so far as he is concerned, merely imposes upon him a proper duty and has no bearing upon his constitutional rights. As stated by the Supreme Court in *Aikins* v. *Kingsbury*, 247 U. S. 484, 489, "he who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right." It is not sufficient that the statute may adversely affect the rights of others; and it can make no difference that others who claim to be injured are assailing its constitutionality.

In *Smyth* v. *Titcomb*, 31 Maine 272, 285, 286, a tax collector who refused to collect taxes upon the ground that the statute which levied them was unconstitutional, was required by mandamus to perform the duty imposed upon him by the statute, without regard to whether or not it was constitutional. The court said:

"It does not, however, lie with the respondent, as a ministerial officer, to make this objection. He is not authorized, or required to adjudicate the law. On a summary hearing on a petition for a *mandamus*, this court will not determine the question of the constitutionality of the law, involving the rights of third persons, but will leave that question to be settled, when properly presented by parties to an action. For this hearing, we assume that the act is constitutional. *The People* v. *Collins*, 7 Johns. 549.

"We have thus noticed the principal objections; but there are considerations which lie at the foundation of these proceedings, that may be properly suggested at this time. A public officer entrusted with the collection and disbursement of revenue, in any of the departments of the government, has no right to refuse to perform his ministerial

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duties, prescribed by law, because he may apprehend that others may be injuriously affected by it, or that the law may, possibly, be unconstitutional. He is not responsible for the law, or for the possible wrongs which may result from its execution. He cannot refuse to act, because others may question his right. The individuals to be affected, may not doubt the constitutionality of the law; or they may waive their supposed rights or wrongs; or may choose to contest the validity of the enactment, personally. Public policy, as well as public necessity and justice, require prompt and efficient action from such officers."

The foregoing language was quoted with approval by the Supreme Court of Errors of Connecticut in *Levitt* v. *Attorney General*, 111 Conn. 634, 646, which denied the right of the Attorney General of the state to refuse to carry out a statutory enactment upon the ground that he had determined it to be unconstitutional, the court saying:

"One administrative officer can not attack the constitutionality of a statute because it may violate the constitutional rights of other administrative officers in order to avoid his own performance of a mandatory duty imposed upon him by that statute."

The failure of an officer to discharge a duty imposed upon him by law may be nonfeasance and penal or actionable. While it is not my purpose to emphasize the section or to consider its possible application to any failure to collect the processing taxes under the Agricultural Adjustment Act, I have noticed the provision in Section 146, Title 26 of the United States Code, relating to collections of internal revenue, that "when any collector *fails* either *to collect* or to render his account, or to pay over in the manner or within the times provided by law, the General Accounting Office shall, immediately after evidence of such delinquency, report the same to the Solicitor of the Treasury, who shall issue a warrant of distress against such delinquent collector * * *"

If it should be assumed that a ministerial officer charged with nonfeasance might successfully defend upon the ground of invalidity of the statute, nevertheless it does not follow that he would entirely escape the ordinary consequences of ignoring the written law. In this I have par-

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ticularly in mind that an inferior officer or employee who should ignore a statute prescribing his duty, upon the ground of its invalidity, would quite probably be dismissed, at least if his constitutional views should be at variance with those of his superiors. Even the President, upon one occasion, escaped by only one vote being removed from office upon impeachment on charges concerning largely a refusal to obey an act of the Congress (the Tenure of Office Act) which he had believed with good reason (See *Myers* v. *U. S.*, 272 U. S. 52, 166) to be unconstitutional, and had refused to approve.

Of course, if an officer is enjoined by a court of competent jurisdiction he must obey the mandate of the court, but even in this he must not blindly accept as final any and every order which may issue, for there may be error. In the case which has moved you to request my opinion there is, I think, reasonable ground for believing that error may have been committed. The Circuit Court of Appeals, in reversing the District Court, was not unanimous; and the decisions in districts beyond the First Circuit have not been entirely uniform. The Supreme Court will be asked to review the ruling in the First Circuit as soon as practicable after it convenes at its next term.

It is not, however, my purpose to consider herein the effect of an appeal, or other proceeding for review, upon the force and effect of an injunction actually issued. The Disbursing Officers, concerning whose duties you have requested my opinion, are not affected by any injunction, were not parties to the case which you mention and, furthermore, aside from what the court may have said or intimated, there has been no decision in any case directly bearing upon their duties.

The harsh results that have sometimes attended the most reasonable reliance upon judicial decisions subsequently reversed or overruled, are pointed out in a recent published work, *The Effect of an Unconstitutional Statute*, by Oliver P. Field—Chapter VII, "Reliance Upon Decisions and the Effect of Overruling Decisions in Constitutional Law," pp. 181 *et seq.* The apparent truth is that one who sets about to ignore the written law upon the belief that it is uncon-

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stitutional or otherwise ineffective must be unerringly correct in his legal views, judged by the determination of the court of last resort in its final pronouncement; and even that may come too late to avail him fully. Mr. Field mentions an instance (*Boyd* v. *Alabama*, 94 U. S. 645, 649) in which a citizen, relying upon an applicable decision of the Supreme Court of a State (the court of last resort upon the point involved), was convicted and sentenced for the doing of that which the court had said was legal, and he had for his only comfort the State Supreme Court's expression of regret at the necessity for overruling its former decision and the conclusion in the Supreme Court of the United States, to which he appealed, that "if he has been misled by previous adjudications of the State courts, his relief from the present judgment must be sought from the clemency of the Executive."

The author also mentions a case in 1858 (*Ingersoll* v. *State*, 11 Ind. 464) in which a person was charged with violating a statute which had been "repealed" by the legislature. The constitutionality of the repealing act had been challenged and its validity upheld, the State Supreme Court dividing equally, but, after the lapse of several terms, the court finally declared the repealing act unconstitutional. It was held that the defendant should be protected in his reliance on the earlier decisions; and the conclusion was much criticized. Sedgwick (Construction of Statutory and Constitutional Law, 1874, p. 338), denounced the decision as "directly opposed to all correct theory of judicial decision and its effects * * * a weak yielding to the apparent hardship of the case * * * worthless as a precedent." Endlich (Interpretation of Statutes, 1888, p. 746), defended the ruling but conceded that "the weight of decision is the other way."

A fortiori, there can be no assurance of safety in relying upon a judicial determination which has not become final (being subject to review by the Supreme Court) and, aside from that, cannot be said to furnish the rule of decision in circuits other than that in which it was rendered. Observing strict legal principles, the pronouncement in the first Circuit has no more binding force as a rule of decision,

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in the District of Columbia, wherein the Disbursing Officers are located, than has a decision of Massachusetts in the courts of Maryland. The District Court for the Western District of Tennessee has declined to follow it. *La Croix* v. *United States* [July 27, 1935, 11 Fed. Supp. 817]. Conflicting decisions in the several circuits are not entirely unusual; it was to remedy this and to assure uniformity that provision was made for review in the Supreme Court. To accept a decision upon a constitutional question in one circuit and give it Nation-wide application with the effect of setting aside a congressional enactment of major importance would be without precedent, insofar as I am aware, and might even raise a grave question of possible dereliction of duty on the part of the officers charged with the administration of the statute and the conduct of the litigation involving it.

The constitution has vested in no court or officer the power to remove an enactment of the Congress from the statute books upon the ground of its invalidity. When the Supreme Court has finally declared a statute to be unconstitutional, its decision, because of the great faith which we have in that august tribunal, is accepted as final. With respect to a decision of an inferior court, however, this is by no means true, and it is even conceivable that an officer restrained in one circuit from performing a duty imposed upon him by a statute held invalid in that circuit might be required by mandamus to perform the duty in another circuit.

The Congress has only recently provided, in the Emergency Relief Appropriation Act of 1935 that "funds made available by this Joint Resolution may be used, in the discretion of the President, for the administration of the Agricultural Adjustment Act, as amended, during the period of twelve months after the effective date of this Joint Resolution;" and the Congress, still in session and undoubtedly aware of the judicial decisions respecting the constitutionality of the statute, is even now engaged in the consideration of additional legislation involving some phases of matters dealt with in that act. I think it is quite reasonable to assume that if there were any change in the legislative

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will respecting the continuance of payments under these contracts some further statutory direction would be forthcoming. In the absence of it, and pending decision by the Supreme Court, I must conclude that it is the duty of the Disbursing Officers to obey the written law, including the Agricultural Adjustment Act, notwithstanding the decision of the United States Court of Appeals for the First Circuit.

For the foregoing reasons it is my opinion that the Disbursing Officers should continue to make the disbursements authorized under the Agricultural Adjustment Act, at least until the Supreme Court shall have acted or the Congress shall have made further provision.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

VALIDITY OF CERTAIN PROVISIONS OF THE NATIONAL HOUSING ACT

1. The Congress may not only protect and aid the specific national activities over which it has been delegated authority by the Constitution, but it may also provide adequate protection and aid for agencies created by it to exercise Federal powers.
2. The Congress has exercised such powers in providing in the National Housing Act for the insurance of mortgages and the creation of national mortgage associations to deal in such mortgages.
3. The statutory provisions for the national mortgage associations are further justified in view of their designation as depositaries of public money and as financial agents of the Government, and the requirement that they maintain certain investments in bonds or obligations issued or guaranteed by the United States.
4. The general-welfare clause of the Constitution empowers the Congress to spend moneys for the general welfare, and there is no limitation which requires such expenditures to be in the exercise of, or connected with, other enumerated powers.
5. The purposes of the National Housing Act are for the welfare of the Nation as a whole.
6. The power of the Congress to borrow money on the credit of the United States authorizes a guarantee by the United States of obligations incurred by its agencies in the borrowing of money.
7. The insurance and guarantees provided for in the National Housing Act are within the constitutional grants of power to appropriate for the general welfare and to borrow money on the credit of the United States.

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8. The insuring of a mortgage under title II of the National Housing Act, as amended, and the regulations issued thereunder, creates a valid obligation on the part of the Federal Housing Administrator to issue the debentures therein provided for, and the debentures so issued are valid obligations enforcible against the mutual mortgage insurance fund.
9. The guarantee by the United States of such debentures, in accordance with the provisions of section 204 of the act, as amended, constitutes a valid and binding obligation of the United States.
10. The issuance of the certificate of approval by the Administrator to incorporators transmitting articles of association in the form submitted is effective to create a valid national mortgage association under title III of the act, as amended.

DEPARTMENT OF JUSTICE,
August 26, 1935.

SIR: I have the honor to comply with your request of August 19 for my opinion upon the following questions, which have arisen under the National Housing Act (c. 847, 48 Stat. 1246).

"1. Does the insuring of a mortgage under Title II of the National Housing Act, as amended, and the Regulations issued thereunder, create a valid obligation on the part of the Administrator to issue the debentures therein provided for, and are the debentures so issued valid obligations enforceable against the Mutual Mortgage Insurance Fund?

"2. Does the guarantee by the United States of such debentures, in accordance with the provisions of Section 204 (b) of the Act, as amended, constitute a valid and binding obligation of the United States?

"3. Is the issuance of a Certificate of Approval by the Administrator to incorporators transmitting Articles of Association in the form here submitted effective to create a valid National Mortgage Association under Title III of the National Housing Act, as amended?"

The following specimen documents were submitted with your letter:

"(1) Form of Mortgagee's Application for Insurance (included in F. H. A. Form No. 2004, revised July 1, 1935).

"(2) Form of Acceptance for Insurance, endorsed upon the original credit instrument (contained in F. H. A. Form No. 2010, revised June 24, 1935).

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"(3) Form of Mutual Mortgage Insurance Fund Debenture (Draft of August 19, 1935).

"(4) Form of Articles of Association (for National Mortgage Associations), F. H. A. Form No. 2097 (Draft of August 19, 1935).

"(5) Form of Certificate of Approval (for proposed National Mortgage Associations), F. H. A. Form No. 2095 (Draft of August 19, 1935)."

To describe these at greater length would require more space than apparently is justified. I think it is sufficient to say that I have examined them and find that they conform to the provisions of the statute.

The statute is divided into five separate titles, as indicated below, but only Titles I, II, and III are involved in the questions submitted, and Title I is involved only incidentally.

Title I authorized the President "to create a Federal Housing Administration, all the powers of which shall be exercised by a Federal Housing Administrator," and provided, with unimportant exceptions, that the Reconstruction Finance Corporation should make available to the Administrator funds needed for carrying out the provisions of Titles I, II, and III. It also authorized the Administrator to insure banks and other financial institutions "against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations," in accordance with the requirements of the title, for the purpose of improving real property.

Title II, entitled "Mutual Mortgage Insurance," created a "Mutual Mortgage Insurance Fund," and directed that $10,000,000 should be immediately allocated thereto, to be used by the Administrator as a revolving fund for the "insurance of mortgages" of the types therein specified, upon the payment of a fee or premium. The $10,000,000 was intended as an original capital reserve, the plan contemplating that the premiums collected would cover the losses.

The Title also provides in detail the method of realizing upon the insurance in case of default, which may be summarized as follows: Upon conveyance of the mortgaged property to the Administrator and the assignment to him of all

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claims of the mortgagee against the mortgagor arising out of the mortgage transaction or foreclosure proceedings, the Administrator is required to issue to the mortgagee certain debentures, equal in amount to the unpaid principal due on the date of the delivery of the property to the Administrator plus other items provided for in the statute, and a contingent certificate of claim for the balance of the mortgagor's indebtedness. The debentures are "a liability of the fund only" except that, by the terms of the Act, those issued in exchange for mortgages insured prior to July 1, 1937, are fully guaranteed by the United States as to both principal and interest.

Title III is entitled "National Mortgage Associations" and provides for the establishment of such associations to purchase and sell mortgages and to borrow money therefor through the issuance of their obligations. Each is authorized to issue its obligations in an amount not to exceed twelve times the aggregate of its capital (Amendment of May 28, 1935), nor in any event to exceed the current face value of mortgages held by it and insured under Title II *supra* plus cash on hand or invested in Government obligations. Money not invested in mortgages or in operating facilities is required to be kept in cash or in Government obligations.

Finally, Title III provides that any association, when designated for that purpose by the Secretary of the Treasury, shall be a depositary of public money, may be employed as a financial agent of the Government, and may act as agent for any other instrumentality of the United States.

Titles IV and V relate to matters and organizations not involved in the consideration of the questions asked.

While, as above indicated, Title II provides for the "insurance of mortgages," more accurately it is the secured debt or its payment, rather than the mortgage itself, which is insured. In practice the insurance is accomplished by endorsing upon the original credit instrument, "Insured under the National Housing Act and Regulations of the Federal Housing Administrator * * *."

The National Housing Act was approved June 27, 1934.

An important purpose of the Act was to add an agency (the Federal Housing Administration) to the group of

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Government-owned or sponsored financial instrumentalities which would supplement their powers in making credit available for improvements to real estate for financing new construction and for refinancing in cases of maturing loans. The Federal Housing Administration was given authority to insure mortgages in order to make them safe and attractive investments for idle funds. The statute also provided for the creation of other instrumentalities (the National Mortgage Associations) to further these ends by supplying markets for first mortgages. (President's Message, May 14, 1934, 78 Cong. Rec. 8739; House Report 1922, 73d Cong., 2d Sess.; Explanation by Chairman, House Committee on Banking and Currency, 78 Cong. Rec. 11191 *et seq.*)

It is one of the latest of a series of enactments, extending over more than a century, through which the Federal Government has recognized and fulfilled its obligation to provide a national system of financial institutions for handling the credit and exchange requirements of industry, commerce and agriculture, supplying a national currency and promoting the fiscal affairs of the Government. The courts have found the authority for the creation of the other units in the aggregate of the powers of Art. I, Sec. 8, of the Constitution.

"The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress * * *." *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 303.

Early in the last century the Bank of the United States was established (Act of April 10, 1816, c. 44, 3 Stat. 266). The Act of February 25, 1863, c. 58, 12 Stat. 665, established our National Banking Associations, with large powers over the currency. The Federal Reserve System was established by the Act of December 23, 1913, c. 6, 38 Stat. 251, to protect the credit resources in time of stringency. The Federal Farm Loan Act, with provisions for the Federal Land Banks, Joint Stock Land Banks and National Farm Loan Associations was added July 17, 1916 (c. 245, 39 Stat. 360). By an amendment of March 4, 1923, c. 252, 42 Stat. 1454, the Federal Intermediate Credit Banks became a part of the system. The Agricultural Marketing Act of June 15, 1929, c. 24, 46 Stat. 11, provided credit for certain farmers' cooperative associations. To finance building, savings, and loan associa-

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tions and other similar organizations the Federal Home Loan Bank Act of July 22, 1932, c. 522, 47 Stat. 725, was passed. The Reconstruction Finance Corporation Act of January 22, 1932, c. 8, 47 Stat. 5, as amended, provided credit facilities for banks, railroads and other classes of borrowers.

The authority to legislate in this manner for these broad purposes has been invariably upheld when tested. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *United States Bank*, 9 Wheat. 738; *Farmers', etc., National Bank* v. *Dearing*, 91 U. S. 29; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Westfall* v. *United States*, 274 U. S. 256.

The activities of these institutions over the years have imbedded them deeply in the economic structure of our nation. The credits furnished through their facilities have substantially displaced the national currency in business transactions, as a large percentage (assumed by responsible governmental agencies to be more than 90 percent.) of actual payments in business transactions are made by check. The importance of this "credit currency" was forcefully illustrated in the banking crisis of 1933, when the nation realized the impossibility of conducting modern business on a cash basis. Of course, the sum of authorized coin and currency is only a fraction of the amount needed to liquidate bank deposits alone.

By 1934 the federal banking instrumentalities held large quantities of real estate mortgages and were active in procuring and distributing such securities. The facts and figures hereinafter stated indicate the comparative extent of their activities and holdings. On December 30, 1933, 6,011 banks out of a total of 15,011 were in the Federal Reserve System.[1] While the amount of mortgage paper held by them in connection with loans on properties of residential character, within the class made insurable under the National Housing Act, is not definitely known, available information indicates that the figure approximates $800,000,000.[2] It is also worthy of mention, in this connection, that 6,540 additional banks, not members of the Federal Reserve System but insured by the Federal Deposit Insurance Cor-

[1] 1934 An. Rept., Fed. Res. Bd., p. 140.

[2] Member Bank Call Rept. No. 60, Fed. Res. Bd., Dec. 30, 1933, Table p. 3 (40% of $2,041,000,000).

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poration,[3] held several hundred million dollars in such mortgage paper.[4]

In the Spring of 1934 the total investments in real estate mortgages in this country approximated $43,000,000,000,[5] of which it has been assumed by responsible governmental agencies that about $20,000,000,000 represented investments in urban home mortgages. In approximately half the cases the mortgagors were in default.[6] Conditions were such that foreclosures were impracticable. The virtual drying up of the sources of mortgage money is graphically illustrated by the figures respecting new loans by two principal lending sources, the life insurance companies and the building and loan associations. Twenty-five leading life insurance companies which had invested $840,000,000 in mortgages on city properties in 1929, invested only $30,000,000 in such mortgages in 1933 and only $15,000,000 in the first part of 1934 [7]—a decline of 96 percent. New loans made by building and loan associations decreased from $1,900,000,000 in 1928 to $394,000,000 in 1933 and $277,000,000 in 1934 [8]—a decrease of more than 85 percent.

The guaranteeing of mortgages, which had become an important part of real estate security distribution, ceased. Complete statistics are not readily available, but information before me indicates that fifty New York companies, with total outstanding guarantees of $2,867,000,000 in 1930, had suspended payments in 1933, and most of them were still in process of rehabilitation in the spring of 1934.[9]

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[3] First An. Rept., Fed. Dep. Ins. Corp., p. 176.

[4] Estimate based on study by Fed. Hous. Adm. and Fed. Dep. Ins. Corp., Dec. 1934.

[5] Cong. Rec., April 27, 1933, pp. 2518–2520.

[6] Press Release July 13, 1935, Bureau For. and Dom. Commerce, Financial Survey of Urban Housing, entitled "Terms of Credit Used in Acquiring Homes," pp. 12, 13; average of delinquencies for owner-occupied houses in 61 cities, 40%, in some large cities more than 50%; average assumed to be greater when rented houses included.

[7] August, 1935, compilation by Bureau of Agricultural Economics Dept. of Ag., based upon weekly figures from reports of life insurance companies appearing periodically in Wall Street Journal and New York Evening Post.

[8] Press release Fed. Home Loan Bank Bd., March 20, 1935, "Lending Capacity of Building and Loan Associations."

[9] Report of Oct. 5, 1934, to the Governor of N. Y. by George W. Alger, Commissioner, concerning the affairs of title and mortgage guarantee corporations (pp. 9, 62, 63, 65).

On account of the difficulty in obtaining accurate statistics concerning the foregoing matters, it is recognized that those used may not be beyond question. However, they are from reliable sources and at least correctly indicate the general situation.

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Real estate paper had long been a favorite investment of insurance companies, savings banks, building and loan associations, and careful private investors, but these and other investing groups, corporate, trust and individual, were no longer willing to buy it, and there appeared no feasible method of restoring the normal flow of this type of security except through some new financial instrumentality or instrumentalities. The Act was obviously designed to break this jam by restoring confidence in real estate mortgages and broadening the base for the distribution of such paper.

The effect, if successful, would be to relieve pressure on financial institutions, stimulate the real estate security market and restore financial operations to a more nearly normal condition.

The Federal Government has used insurance and guarantees in other activities. Bank deposit insurance had been undertaken by the Federal Deposit Insurance Corporation under the Act of June 16, 1933, c. 89, 48 Stat. 162, 168. The War Risk Insurance Act of September 2, 1914, c. 293, 38 Stat. 711, is well known, as also is the later legislation providing insurance for soldiers and veterans of the World War. Guarantees had been authorized for obligations of the Home Owners' Loan Corporation and Reconstruction Finance Corporation.

I

Not only may the Congress protect and aid those specific national activities over which it has been delegated authority by the Constitution,[10] and in so doing enter into fields of the country's life beyond the federal authority save for their effect upon such specific national activities,[11] but it may also provide adequate protection and aid for agencies created by it to exercise federal powers. This is so even where such agencies have been given some functions which, considered alone, "might be beyond the power of Congress to author-

[10] *United States* v. *Ferger*, 250 U. S. 199, 203, 205–6; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548–9; see *Schechter Poultry Corp.* v. *United States*, decided by the Supreme Court May 27, 1935 (295 U. S. 495).

[11] Ibid; see also *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 34–38.

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ize."[12] Such power, I think, is necessarily incident to, and indeed inherent in, the powers under which such agencies are established. As pointed out by the Supreme Court in *Farmers' etc. National Bank* v. *Dearing*, *supra* (p. 34):

"The power to create [the National Banks] carries with it the power to preserve. The latter is a corollary from the former. * * * The principle * * * is indispensable to the efficiency, the independence, and indeed to the beneficial existence, of the General Government * * *."

Smith v. *Kansas City Title Co.*, *supra*—which upheld the authority of the Congress "to facilitate the making of loans upon farm security at low rates of interest," regardless of any question of its power to provide independently therefor (see p. 211), by creating Federal Land Banks and Joint Stock Land Banks, designated as depositaries of public moneys and fiscal agents of the Government and which supplied a market for Government bonds (pp. 210–211)—established the right of the Congress to protect this lending power specifically, and the position of the banks generally, by providing exemption from state taxation for bonds issued by the banks upon the security of mortgages acquired by them in making farm loans (pp. 211–213).

Similarly, *Westfall* v. *United States*, *supra*, established the power of the Congress to punish the misapplication of the funds of state banks which were members of the Federal Reserve System, even though no loss to Federal Reserve Banks resulted. "Congress may employ state corporations

[12] See *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 211. The language quoted was used by the Court in discussing *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, which upheld the power conferred upon national banks to exercise the office of trustee, executor, administrator or registrar of stocks or bonds. In that case the Court, at p. 420, commented as follows upon the decision in *Osborn* v. *Bank*, 9 Wheat. 738, reaffirming the validity of the legislation which created the Bank of the United States:

"* * * It was expressly held that the authority of Congress was to be ascertained by considering the bank as an entity possessing the rights and powers conferred upon it and that the lawful power to create the bank and give it the attributes which were deemed essential could not be rendered unavailing by detaching particular powers and considering them isolatedly and thus destroy the efficacy of the bank as a national instrument. The ruling in effect was that although a particular character of business might not be when isolatedly considered within the implied power of Congress, if such business was appropriate or relevant to the banking business the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful."

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with their consent as instrumentalities of the United States * * * and may make frauds that impair their efficiency crimes." (p. 259.)

Since the financial instrumentalities heretofore established with judicial approval were holders of such large quantities of real estate mortgages (much of it eligible for insurance under the National Housing Act, and of the type which the National Mortgage Associations are authorized to acquire) as materially to affect their liquidity and efficiency, it was within the power of the Congress to legislate to aid and protect these instrumentalities and the general financial system of the country of which they are an integral part and with the fate of which they are inseparably linked. As I have previously indicated in this opinion, the restoration of confidence in such mortgages and the encouraging of a wider distribution of this type of paper among investors seem to me reasonably designed to accomplish these purposes and reasonably calculated to result from the insurance of such mortgages by an agency of the United States, with the guarantee of the Government, and from the purchase and sale thereof by the National Mortgage Associations.

II

A further justification of the legislative provisions relating to the establishment of National Mortgage Associations may be found in an additional doctrine established by certain of the cases heretofore discussed. These Associations, provided for in Title III, are by express provision of the statute required to maintain certain investments in "bonds or obligation of, or guaranteed as to principal and interest by, the United States" and, furthermore, under Section 308—

"When designated for that purpose by the Secretary of the Treasury any national mortgage association shall be a depositary of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties as a depositary of public money and financial agent of the Government as may be required of it. Any national

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mortgage association may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality" [48 Stat. 1255].

The Associations, and their activities in the purchase and sale of mortgages, are plainly valid under the principle declared by the Supreme Court in the following language, taken from the opinion in *Smith* v. *Kansas City Title Co.*, *supra.*, (pp. 210–211):

"That Congress has seen fit, in making these banks [Federal Land Banks and Joint Stock, etc.] fiscal agencies and depositaries of public moneys, to grant to them banking powers of a limited character, in nowise detracts from the authority of Congress to use them for the governmental purposes named, if it sees fit to do so. A bank may be organized with or without the authority to issue currency. It may be authorized to receive deposits in only a limited way. Speaking generally, a bank is a moneyed institution to facilitate the borrowing, lending and caring for money. But whether technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. Furthermore, these institutions are organized to serve as a market for United States bonds. Not less than 5% of the capital of the Federal Land Banks, for which stock is outstanding to Farm Loan Associations, is required to be invested in United States bonds. Both kinds of banks are empowered to buy and sell United States bonds. * * *

"We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositaries of public moneys and purchasers of Government bonds, brings them within the creative power of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities, destroyed the authority of Congress to create those institutions."

It therefore seems clear that the Congress had power to provide for the creation of the National Mortgage Associations.

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III

It is provided in the Constitution (Art. I, Sec. 8):

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States * * *."

From the power to tax for the purposes specified, there arises the right to expend for the same purposes the revenues derived from the taxes so authorized. Cf. *United States* v. *Realty Co.*, 163 U. S. 427, 440.

While there have been many appropriations of funds in the interest of the general welfare during all periods of our national existence, the question of the permissible extent of the exercise of this power has seldom come before the Supreme Court.

In *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 681, 683, the court referred to "the great power of taxation to be exercised for the common defense and general welfare," although the conclusion, upholding the right of the Government to establish the Gettysburg National Military Park, was not based entirely upon this source of power. As the court stated—and the principle is applicable in the present case—"any number of * * * powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred."

In *United States* v. *Realty Co.*, *supra*, (a decision perhaps not strictly applicable here because based on the principle that the Congress may appropriate money to pay "debts" not strictly legal in character but cognizable upon considerations of honor, morals, gratitude, charity, etc.) the court noticed the long practice of the Congress in making appropriations in the interest of the general welfare and mentioned a list of acts making such appropriations, appended to the brief for one of the defendants in error. Another, and shorter, list of such statutes appears in 74 Cong. Rec. 708. I think, however, the practice is too well established and too well known to require evidence in support of its existence.

This dearth of adjudications in the Supreme Court concerning the general welfare clause is accounted for, in part,

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by the fact that the power, although long and repeatedly exercised by the Congress, has seldom been seriously challenged; but it is also of bearing, as indicated by *Massachusetts* v. *Mellon*, 262 U. S. 447, (involving a challenge of the constitutionality of the Act appropriating funds for the furtherance of efforts to reduce maternal and infant mortality) that it does not ordinarily lie within the province of a litigant to challenge the power and discretion of the Congress in this respect.

The Circuit Court of Appeals for the Eighth Circuit, in *Langer* v. *United States*, 76 F. (2d) 817, 825, recently (May 7, 1935) had occasion to consider the question and concluded in favor of the authority of the Congress to appropriate money "for purposes outside of the enumerated powers"—for public purposes connected with the general national welfare—and it quoted in this connection the statement in *McPherson* v. *Blacker*, 146 U. S. 1, that "the construction * * * has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and must be treated as decisive."

The Circuit Court of Appeals for the Tenth Circuit, in *Kansas City Gas and Electric Co.* v. *City of Independence* [August 20, 1935, 79 Fed. (d) 32], has reached the same conclusion, aptly pointing out that—

"If the taxing power were limited to the power to lay taxes to effectuate the sixteen specific powers that follow it, the tax clause would be mere verbiage * * *."

The only contrary view of comparable authority was expressed in 1895 in *U. S. ex rel. Miles Planting & Mfg. Co.* v. *Carlisle*, 5 D. C. App. 138, 146–161.

I think I may safely say that practically all commentators upon the Constitution, including many who actually participated in its framing and in the events which accompanied its adoption, have concluded that the so-called general welfare clause empowers the Congress to spend moneys for the general welfare and that there is no limitation which requires that such expenditures shall be in the exercise of or connected with other enumerated powers. Hamilton's Works (Lodge ed.) v. 4, pp. 70, 151; Monroe, View of the President of the United States on the Subject of In-

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ternal Improvements, 2 Richardson, 144, 167–173; Calhoun, 5 Benton (Abridgement) 704, 706; Tucker, American State Papers, Miscellaneous, 443, 446; John Quincy Adams, Inaugural Address, 2 Richardson, 298; Story on the Constitution (5th ed.) Secs. 913, 923, 924, 991; Hare Constitutional Law, p. 241; Pomeroy, Introduction to Constitutional Law, (10th ed.) Secs. 274–275; Burdick on the Constitution, Sec. 77; Willoughby, United States Constitution, (2d ed.) v. 1, Sec. 62; Corwin, The Spending power of Congress, 36 Harvard L. R. 548.

The debates in the ratifying conventions in the states indicate acceptance of the same view. Elliott's Debates on the Federal Constitution—Analyses by Corwin, 36 Harvard L. R. 548, and McGuire, 23 Georgetown L. J., 155, 171.

I quote from Hamilton, *supra*, (p. 151) in his Report on Manufactures:

"The phrase is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the 'general welfare,' and because this necessarily embraces a vast variety of particulars which are susceptible neither of specification nor of definition. It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money. * * *"

President Washington, it may be noted during his first term, recommended to the Congress an appropriation "for the establishment of a national university and the encouragement of agriculture," which, presumably, is to be justified as an appropriation in the interest of the general welfare. Richardson, Messages and Papers of the Presidents, pp. 201–202.

Willoughby, *supra*, states:

"It scarcely needs to be pointed out that a considerable number of the administrative services now carried on by the

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National Government and maintained by Federal appropriations, depend for their constitutionality wholly upon the power of Congress to authorize the expenditure of public moneys for the promotion of the general welfare of the United States. Among such services which are to a very slight, if any, extent concerned with matters directly connected with the exercise of powers specifically or by implication vested in the Federal Government, may be mentioned the Public Health Service, the Bureau of Education, the Geological Survey, the Bureau of Mines, the Department of Agriculture, with its many bureaus, the Bureau of Fisheries, the Bureau of Labor Statistics, the Children's Bureau, the Women's Bureau, the Smithsonian Institution, the National Gallery of Art, the Bureau of American Ethnology, the Astrophysical Observatory, and many of the special services in various of the other administrative departments of the Federal Government."

I regard it, therefore, as an established principle that the Congress has the power, which it has in fact so long and repeatedly exercised, to provide from the Treasury for the general welfare. It further seems to me incontrovertible that the purposes of the National Housing Act are for the welfare of the nation as a whole. Not only does the Act provide protection for our national financial structure, but it will also result in encouragement of better housing conditions throughout the country, in the provision of cheap and safe credit for the home owners of the United States, and in the stimulation of the building industry, and indirectly of the durable goods industry, with consequent improvement in general conditions, including the furnishing of employment to many of the nation's unemployed.

The power to expend necessarily includes the power to assume contractual obligations to pay money, and contingent obligations are as much within the power as are absolute promises. Furthermore, the power of the Congress to borrow on the credit of the United States—which must permit borrowings for all purposes for which the Congress is authorized to make expenditures—logically authorizes a guarantee by the United States of obligations incurred by its agencies in the borrowing of money. In my opinion to you of August 22, 1933, upon the validity of bonds issued by the

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Home Owners' Loan Corporation and the guarantee of such bonds by the United States—the principles of which are generally applicable here—I stated the following:

"The power to borrow on the credit of the United States necessarily includes the power to make only a partial use of that credit for borrowing purposes. In my opinion Congress is making a valid use of its borrowing power when it authorizes a corporate agency to borrow and places the credit of the United States behind payment of the * * * obligations which that Corporation issues" [37 Op. 241, 247].

I am, therefore, of the opinion that the insurance and the guarantees provided for in the Act are within the constitutional grants of power to appropriate for the general welfare and to borrow money on the credit of the United States.

Based upon the right of the Congress to protect the established financial institutions, to arrange for government instrumentalities to handle the fiscal affairs of the nation, and to provide for the public welfare by using its funds to finance mortgage insurance and its credit to guarantee debentures issued under Title II of the Statute, I am of the opinion that each of the questions submitted should be answered by an unqualified affirmative.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

DEDICATION OF LAND FOR USE AS PARKS, PLAYGROUNDS, OR STREETS IN CONNECTION WITH LOW-COST HOUSING AND SLUM-CLEARANCE PROJECTS

In connection with the carrying out of low-cost housing and slum-clearance projects, the Government may, if it is deemed necessary or advantageous to the project, dedicate land to the city or other public body for use as a park or playground, or as a street, provided that the function of any land dedicated for use as parks or playgrounds is incidental to the contemplated low-cost housing or slum-clearance projects and reasonably necessary to provide therefor proper light, air, approaches, etc., as distinguished from monumental, landscaping, scenic, or similar functions.

The reasoning of the opinion to the Secretary of the Interior of September 10, 1934, in which it was held that the Government may dedicate land for roads, streets, walks, parks, and parkways in connection with subsistence homestead projects, is applicable here.

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DEPARTMENT OF JUSTICE,
September 16, 1935.

SIR: In your letter of June 11 you requested my opinion whether, in connection with the carrying out of low-cost housing and slum-clearance projects, "the Government may, in a case where deemed necessary or advantageous to the project, dedicate land to the city or other public body for use (1) as a park or playground or (2) as a street, provided such dedication in either case is calculated to procure the intended advantages on an economical basis, it being understood that the dedication would provide for reversion of full ownership to the Government in the event of failure to use the land for the specified purpose."

Section 202 of the National Industrial Recovery Act (Title II, relating to public works and construction projects) provided that the Public Works Administrator, under the direction of the President, "shall prepare a comprehensive program of public works, which shall include among other things * * * construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects" (48 Stat. 201).

Section 203 authorized the President, acting through the Administrator, "to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to Section 202", with express authority to acquire land needed in connection therewith and to sell "any property so constructed or acquired or to lease any such property with or without the privilege of purchase."

The Emergency Relief Appropriation Act of 1935 contained the following provisions:

"SEC. 12. The Federal Emergency Administration of Public Works established under title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purposes of said Act shall be available

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until June 30, 1937 * * *" (Public Resolution No. 11—74th Congress).

"SEC. 5. In carrying out the provisions of this joint resolution the President is authorized (within the limits of the appropriation made in section 1) to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein."

Whether or not the last quoted Section (5) of the Emergency Relief Appropriation Act of 1935 is applicable, and whether the dedication of land for parks, play grounds and streets would come within its language, "or otherwise dispose of any such property or interest therein", I find unnecessary to determine.

In my opinion to you of September 10, 1934, I considered a proposed dedication of land for roads, streets, walks, parks and parkways in connection with subsistence homesteads projects, provided for in another Section (208) of Title II of the National Industrial Recovery Act and stated the following conclusions:

"This question is answered affirmatively. I do not regard such dedication as necessarily representing a gratuity. It more nearly approximates the transfer of a liability, properly assumable by the local authorities. Roads and streets, at least, are indispensable and it is hardly to be supposed that they are to be owned and maintained indefinitely by the United States in a community of private citizens who, as pointed out in the opinion of July 18, 1934, will have the political status of residents of the states and of the subdivisions thereof in which they live, with the right to have their needs for roads, schools, etc., considered by the local authorities in like manner as other citizens" (38 Op. 57, 63).

The same reasoning is applicable here; and I therefore answer both questions affirmatively, with the qualification, however, that the function of any lands dedicated for use as parks or playgrounds must be incidental to the contemplated low-cost housing or slum-clearance projects and

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reasonably necessary in order to provide therefor proper light, air, approaches, etc., as distinguished from monumental, landscaping, scenic or similar functions.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the ADMINISTRATOR of PUBLIC WORKS.

QUESTIONS RELATING TO THE ADMINISTRATION OF THE FEDERAL REGISTER ACT

1. The publication of the Federal Register is not required by the Federal Register Act to be commenced until the appropriations to the Government Printing Office have been increased as provided for in section 9 of the Act, but such publication should commence on the date such increased appropriations are made available.
2. The provisions of section 2 of the Act requiring the filing of documents with the Director of the Federal Register Division in the National Archives Establishment and the making of copies of such documents available for public inspection do not become effective until the appropriations for the Government Printing Office have been increased as above stated, but such provisions will become effective on the date such appropriations are made available.
3. The provisions of section 11 of the Act requiring the agencies of the Government to prepare and file with the Committee the compilation of all documents referred to in that section became effective on July 26, 1935, the date the Act was approved, and each agency is required to prepare and file such compilation within 6 months after that date.
4. Funds heretofore appropriated for the National Archives are available for payment of the salary of the Director of the Division of the Federal Register.

DEPARTMENT OF JUSTICE,
September 17, 1935.

SIR: Pursuant to your request as set forth in the letter of your Assistant Secretary, Mr. Marvin H. McIntyre, dated September 3, 1935, I have considered the questions raised by the Archivist of the United States in his letter to you, dated August 31, 1935, relative to the administration of the Federal Register Act, approved July 26, 1935 (Public No. 220, 74th Congress; 49 Stat. 500). These questions are:

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1. Whether, in view of the failure of the special appropriations called for in section 9 of the said Act, publication of the Federal Register must be commenced 63 days after the approval of the Act, and if not, at what time must such publication begin?

2. Whether, in view of the failure of the said appropriations, the provisions of section 2 of the Act which require the filing of documents in the Federal Register division become effective 60 days after the approval of the Act, and if not, when do these provisions become effective?

3. Whether, in view of the failure of said appropriations, the provisions of section 11 of the Act, relating to the compilation and publication of all prior administrative rules and orders, became effective upon the approval of the Act, and if not, when do these provisions become effective?

The answers to these questions depend upon the construction to be placed upon the following provisions of section 10 of the Federal Register Act:

"The provisions of section 2 shall become effective sixty days after the date of approval of this Act and the publication of the Federal Register shall begin within three business days thereafter: *Provided*, That the appropriations involved have been increased as required by section 9 of this Act. * * *" (49 Stat. 503).

Section 9 of the Act, referred to in the proviso above quoted, in so far as it relates to appropriations is in the following words:

"The cost of printing, reprinting, wrapping, binding, and distributing the Federal Register and any other expenses incurred by the Government Printing Office in carrying out the duties placed upon it by this Act shall be borne by the appropriations to the Government Printing Office and such appropriations are hereby made available, and are authorized to be increased by such additional sums as are necessary for such purposes, such increases to be based upon estimates submitted by the Public Printer. The purposes for which appropriations are available and are authorized to be made under section 10 of the Act entitled "An Act to establish a National Archives of the United States Government, and for other purposes" (48 Stat. 1122) are enlarged to cover

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the additional duties placed upon the National Archives Establishment by the provisions of this Act. * * *"

In view of the above, I am of the opinion that publication of the Federal Register is not required until such time as the appropriations to the Government Printing Office have been increased for that purpose, notwithstanding such time may be more than 63 days after the approval of the Act.

I am also of the opinion that the provisions of section 2 of this Act requiring the filing of documents with the division in the National Archives Establishment do not become effective until such appropriations have been increased.

It is true that the only appropriations required by section 9 of the Act to be presently *increased* are the appropriations to the Government Printing Office. This section makes the present appropriation to the National Archives Establishment available for the expense occasioned by the additional duties placed upon that establishment by the Act, and authorizes increases for that purpose in future appropriations to be made to that establishment. Moreover, the legislative history of the proviso in section 10 might be considered of importance. The original bill as passed in the House did not contain the proviso. It was added to the bill in the Senate by amendment. In the conference report on the bill the object of this amendment is explained as follows:

"The effect of this amendment is to modify the time when the provisions of section 2 of the Act should become effective, *so as not to require publication before the necessary appropriations are available.*" [Italics supplied.]

Considering these facts, and under the opinion of the Supreme Court in *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 181, it might be contended that properly construed the proviso relates only to the publication of the Federal Register.

On the other hand, grammatically the proviso would seem to apply to the whole of the preceding portion of section 10 and therefore to relate to both the filing and the publication. Moreover, the Supreme Court has held that in construing a proviso, as in other statutory construction, "it is the duty of the courts to find, if possible, within the four corners of the Act, and from the language used, the scope

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and meaning of the law." (*White* v. *United States*, 191 U. S. 545, 551.)

Viewed in this light and considered as a whole the Act would seem to contemplate a contemporaneous filing and publication. Section 2 of the Act relates to the filing of documents and the duties of the Director of the division with reference thereto. Section 3 relates to the publication of such documents. Section 5 defines the kind and classes of documents required to be filed and published. Section 7 provides that documents which are required to be published shall be invalid as against persons having no actual knowledge thereof until they have been filed with the division and copies made available for inspection as provided in section 2. Section 10 in its entirety reads as follows:

"The provisions of section 2 shall become effective sixty days after the date of approval of this Act and the publication of the Federal Register shall begin within three business days thereafter: *Provided*, That the appropriations involved have been increased as required by section 9 of this Act. The limitations upon the effectiveness of documents required, under section 5 (a), to be published in the Federal Register shall not be operative as to any document issued, prescribed, or promulgated prior to the date when such document is first required by this or subsequent Act of the Congress or by Executive order to be published in the Federal Register."

The limitations upon the effectiveness of documents referred to in section 10 are those contained in section 7 of the Act, and are as follows:

"No document required under section 5 (a) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 2; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby."

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These provisions of the Act considered together would seem to show that the Congress intended there should be a direct relation between the filing and the publication of documents, and that it was not contemplated one should be done without the other. Obviously the purpose of the provisions of section 7 above quoted was to compel the filing of these documents by making them invalid until filed. And since section 10 provides that these provisions of section 7 shall not become operative until such time as the documents are *required to be published*, there would seem to be no necessity for a sooner filing. Until that time arrives the documents will be valid whether filed or not. I am of the opinion, therefore, that until that time does arrive the documents are not required to be filed.

The letter of the Archivist suggests the view that filing and publication should begin 60 days and 63 days, respectively, after the printing appropriations are ultimately increased. However, under the terms of the Act, the filing and publication are to begin 60 days and 63 days, respectively, "after the date of the approval of this Act" and not 60 days and 63 days, respectively, after the appropriations are increased. Apparently the Congress contemplated that the appropriations would be increased within the 60-day period, and if this had been done unquestionably the filing and printing must necessarily have commenced 60 days and 63 days, respectively, after the approval of the Act. I am of the opinion, therefore, that the increase of the appropriations is the only contingency affecting the time for the beginning of the filing and publication after the expiration of the 60-day and 63-day periods, and that when the appropriations have been increased such filing and publication must commence immediately.

The failure of the appropriations to the Government Printing Office necessarily delays the time when publication of the compilations of documents referred to in section 11 of the Act shall be made. It is my opinion, however, that the proviso in section 10 does not in any way affect those provisions of section 11 which require Federal agencies within six months after the approval of the Act to prepare and file with the committee established under the Act the

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compilations of documents referred to in that section. The proviso makes no reference to section 11, nor do I find anywhere in the Act any provision which would indicate that the Congress intended that a failure of the appropriations should operate as a postponement of the time during which the agencies should prepare and file such compilations. I am of the opinion, therefore, that the governmental agencies are required to prepare and file these compilations within six months after the approval of the Act.

In view of the foregoing, I am of the opinion that the questions propounded by the Archivist should be answered as follows:

1. The publication of the Federal Register is not required by the Act to be commenced until the appropriations to the Government Printing Office have been increased in the manner provided for in section 9 of the Act, but such publication should commence on the date such increased appropriations are made available.

2. The provisions of section 2 of the Act requiring the filing of documents with the Director of the division in the National Archives Establishment and the making of a copy of such documents available for public inspection do not become effective until the said appropriations to the Government Printing Office have been increased in the manner provided for in section 9 of the Act, but such provisions will become effective on the date such appropriations are made available.

3. The provisions of section 11 of the Act requiring the agencies of the Government to prepare and file with the committee the compilation of all documents referred to in the said section became effective on July 26, 1935, the date of the approval of the Act, and each agency is required to prepare and file such compilation within six months after said date.

An administrative difficulty may arise by reason of the fact that filing and publication of documents must be commenced on the date increased appropriations to the Government Printing Office are made available. Since documents of the kind and class referred to in section 5 (a) of the Act will be invalid after that date unless filed, it will be neces-

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sary for the several administrative agencies to be informed of the exact time the Act increasing such appropriations is approved by the President. This would seem to be impractical. This difficulty, however, can be eliminated by the insertion in the Act of the Congress making the increased appropriations available a provision that such increase shall be available on a specified date after the approval of the Act, or that the filing and publication of documents shall commence on a specified date subsequent to the date such appropriations are available.

In his letter the Archivist, referring to the division authorized to be set up in the National Archives Establishment, states that he has "assumed that the creation of this division and the appointment of a director thereof are not affected by the failure of the Congress to provide funds for the purposes specified in the remainder of the act and that the director, as an officer of the National Archives, is to be paid out of the moneys already appropriated to the National Archives." It will be noted that section 9 of the Federal Register Act specifically provides that the purposes of the general appropriations *available* for the National Archives Establishment are enlarged to cover the additional duties placed upon that establishment by the Federal Register Act. I am of the opinion, therefore, that the Archivist has correctly construed the Act in this respect.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the PRESIDENT.

AUTHORITY OF THE POSTMASTER GENERAL WITH RESPECT TO CERTAIN CONTRACT FOR OCEAN-MAIL SERVICE

The Postmaster General is not required to cancel the contract of June 9, 1928, between the United States and the Munson Steamship Line, Inc., for ocean-mail service between New York and Buenos Aires because of the failure of the contractor to provide and operate vessels in accordance with the contract, but he may accept the service rendered and make suitable deductions from the amounts otherwise due and payable under the contract.

The question whether the test made to determine whether the vessel met the contract requirements is a question of fact which the Postmaster General must administratively determine, and upon which the right to make the above-mentioned deductions depends.

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DEPARTMENT OF JUSTICE,
September 23, 1935.

SIR: Reference is made to the letter of Acting Postmaster General Branch, dated September 21, 1935, relating to the contract of June 9, 1928, between the United States of America and the Munson Steamship Line, Inc., for ocean-mail service between New York and Buenos Aires, in which letter my opinion is requested as to whether under the conditions stated in the letter the Postmaster General is authorized by law to permit the performance of this contract with the four vessels now in use which are not capable of maintaining 18 knots at sea in ordinary weather, and to pay for their services at the rate of $6.00 per nautical mile.

A copy of the contract in question was submitted with the letter of the Acting Postmaster General. It appears therefrom that the contract was entered into under the Merchant Marine Act, 1928 (45 Stat. 689). Section 408 (a) of that Act defines the several classes of vessels permitted to be used in ocean-mail service. In so far as it affects the question under discussion that section is as follows:

"The vessels employed in ocean mail service under this title shall be divided into classes as follows:

* * * * * * *

"Class 4. Vessels capable of maintaining a speed of 16 knots at sea in ordinary weather, and of a gross registered tonnage of not less than 10,000 tons.

"Class 3. Vessels capable of maintaining a speed of 18 knots at sea in ordinary weather, and of a gross registered tonnage of not less than 12,000 tons.

"Class 2. Vessels capable of maintaining a speed of 20 knots at sea in ordinary weather, and of a gross registered tonnage of not less than 16,000 tons."

Section 409 (a) of the said Act provides in part:

"The rate of compensation to be paid under this title for ocean-mail service shall be fixed in the contract. Such rate shall not exceed: * * * for vessels of Class 4, $6 per nautical mile; for vessels of Class 3, $8 per nautical mile; for vessels of Class 2, $10 per nautical mile * * *."

The contract obligates the Munson Steamship Line, Inc., to provide and operate in the service contracted for vessels of Class 3 with compensation at the rate of $8.00 per nauti-

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cal mile. The contract also provides that if the needs of the service so require, and upon agreement between the Postmaster General and the Steamship Line, Class 2 vessels may be employed with compensation at the rate of $10.00 per nautical mile.

It is stated in the letter of the Acting Postmaster General that a test recently conducted for the Post Office Department by experts of the Department of Commerce in the method prescribed by the Shipping Board in 1930 shows that one of the vessels now used in this service is incapable of maintaining 18 knots in ordinary weather, and is, therefore, a Class 4 and not a Class 3 vessel. The letter further states that the Department is informed that the other three vessels now used in the service are also incapable of maintaining 18 knots in ordinary weather, and are also, for this reason, Class 4 vessels.

In this connection your attention is invited to section 410 of the said Merchant Marine Act, 1928, which section, headed "Violation of Contracts", provides in part:

"In the case of failure of a vessel from any cause to perform any regular voyage required by a contract made under this title, a pro rata deduction shall be made from the contract price on account of such omitted voyage; and suitable deductions, to be determined by the Postmaster General, may be made from the compensation payable under the contract for delays, failures to properly safeguard the mails, or other irregularities in the performance of the contract. Deductions so determined upon shall be deducted by the Postmaster General from the payments otherwise due and payable under the terms of the contract. * * *"

Also section 404 of the said Act, headed "Authority to Make Contracts", provides in part:

"The Postmaster General * * * shall include in such contracts such requirements and conditions as in his best judgment will insure the full and efficient performance thereof and the protection of the interests of the Government. * * *"

The above-quoted language of section 410 of the Act is incorporated into the contract. The contract also contains this provision:

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"That the Postmaster General may annul this contract or impose fines or penalties in his discretion * * * for failure to provide and operate any vessel in accordance with the requirements of the advertisement and this contract."

It will be noted that the contract permits but does not require the Postmaster General to annul the contract for failure to provide and operate vessels in accordance with the requirements of the contract. It will also be noted that both the contract and the act under which it is made permit but do not require the Postmaster General to determine and make suitable deductions from the payments otherwise due and payable under the terms of the contract for delays, failure to properly safeguard the mail, "or other irregularities in the performance of the contract." It is my opinion that a failure on the part of the Steamship Line to furnish Class 3 vessels for use in the service would be an irregularity in the performance of the contract within the meaning of the contract and of section 410 of the Merchant Marine Act, 1928.

Assuming that the test made was properly made and that the vessel tested is in fact a Class 4 vessel, and that future tests properly made shall prove that other vessels now used in the service are in fact Class 4 vessels, I am of the opinion, for the reasons stated, that you should notify the Steamship Line of the irregularity in the performance of the contract, and insist upon the full performance of the contract in accordance with its terms. If, however, the Steamship Line shall fail, through inability or otherwise, to correct this irregularity, you are not, in my opinion, *required* by law to cancel the contract, but you may accept the service as rendered and may, and I think should, determine and make suitable deductions for such irregularity from the payments otherwise due and payable under the terms of the contract. Since the compensation provided by the contract for the use of Class 3 and Class 2 vessels is $8.00 and $10.00 per nautical mile, respectively, the maximum compensation allowed by the Act for the use of these classes of vessels, and since the maximum compensation allowed by the Act for the use of Class 4 vessels is $6.00 per nautical mile, it is my opinion that the deduction for such irregularity should

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be determined upon the basis of $2.00 per nautical mile such Class 4 vessels are used in the service.

The letter of the Acting Postmaster General makes no reference to the attitude of the Munson Steamship Line, Inc., with respect to the finding by the Postmaster General that the vessel tested is a Class 4 vessel. However, your Solicitor has informally advised me that the Steamship Line has protested this finding on the ground that the test upon which the finding is based was improperly made. I understand that the test was made with the vessel loaded to capacity and that the Steamship Line contends the test should have been made with the vessel loaded to the average tonnage carried on trips in this service. Neither the contract nor the Act under which it was made contains any rule by which such tests are required to be made. The question, therefore, whether the test was a proper one is solely a question of fact, which you must administratively determine, and upon which your right to make the deduction referred to depends.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the POSTMASTER GENERAL.

VALIDITY OF PROPOSED BOND ISSUE OF THE GOVERNMENT OF PUERTO RICO

The proposed bond issue of the Government of Puerto Rico of the face value of $3,778,000 for retiring seven described bond issues maturing January 1, 1936, is authorized under section 3 of the Act of March 2, 1917, 39 Stat. 951, 963, as amended, Act. No. 24 of the Legislature of Puerto Rico, approved July 16, 1935, and the Act of August 3, 1935, Public No. 236, 74th Congress. [49 Stat. 516.]

Issuance of the proposed bonds will not cause the indebtedness of the Government of Puerto Rico to exceed the maximum amount permitted by statute, and the bonds are in accord with the determinations of the Treasurer of Puerto Rico approved by the Government.

The bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Puerto Rico.

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DEPARTMENT OF JUSTICE,
September 25, 1935.

SIR: I have your letter of September 24 in which you state that your Department has been authorized to have issued and to sell for the Government of Puerto Rico refunding bonds of the face value of $3,778,000, the proceeds of which are to be used in the redemption on January 1, 1936, of seven outstanding bond issues, described as follows in the documents which accompanied your letter:

Insular Revenue Obligations

P. R. 4½% Gold Loan of 1919, High School Building bonds callable since January 1, 1930, maturing January 1, 1945		$300,000
P. R. 4½% Gold Loan of 1920, House Construction bonds callable since January 1, 1930, maturing January 1, 1945		250,000
P. R. 4½% Gold Loan of 1925, Target Range and Aviation Field bonds callable since July 1, 1935, maturing:		
July 1, 1945	$50,000	
July 1, 1946	50,000	
July 1, 1947	50,000	
July 1, 1948	50,000	
		200,000
P. R. 4½% Gold Loan of 1934, Munoz Rivera Park bonds (50% is payable by the Government of the Capital of Puerto Rico) callable since January 1, 1934, maturing:		
January 1, 1936	$20,000	
January 1, 1937	20,000	
		40,000
Total Insular Revenue Obligations		790,000

Trust Fund Obligations

P. R. 4% Gold Loan of 1913, Guayama Irrigation Bonds callable since January 1, 1933, maturing January 1, 1943	$1,000,000
P. R. 4% Gold Loan of 1914, Public Improvement bonds callable since January 1, 1925, maturing January 1, 1939	988,000
P. R. 4½% Gold Loan of 1920, Public Improvement bonds callable on January 1, 1936	1,000,000
Total insular bonds callable to January 1, 1936	3,778,000

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You state that the refunding bonds are to be issued in coupon form, in the denomination of $1,000 each, and to be exchangeable for registered bonds, the latter to be issued in the denominations of $1,000, $5,000, $10,000 and $50,000 each. They are to be dated "the first day of the month of sale," and it is contemplated that they will be sold during the present month, in which event the date of issue will be September 1, 1935. Interest will be payable on January 1, 1936, and thereafter semiannually on January 1 and July 1 of each year. There will be ten series, to mature respectively on the dates and in the amounts stated below.

January 1, 1937	$325,000
January 1, 1938	355,000
January 1, 1939	390,000
January 1, 1940	425,000
January 1, 1941	460,000
January 1, 1942	400,000
January 1, 1943	435,000
January 1, 1944	400,000
January 1, 1945	388,000
January 1, 1946	200,000

The purpose of the proposed refunding operation is to obtain the advantage of lower interest rates now prevailing. Therefore, as you point out, the rate of interest has not been definitely fixed, and the advertising will invite each bidder "to name a coupon rate, which will permit him to submit a bid of at least 100%, said rate, however, to be stated as a multiple of ¼ of 1%," the entire issue to carry the same rate.

Both principal and interest will be payable at the Treasury of the United States.

It is proposed to issue the bonds under authority contained in Section 3 of the Act of Congress approved March 2, 1917, entitled "An Act to provide a civil Government for Puerto Rico, and for other purposes," as amended by the Act of March 4, 1927 (c. 145, 39 Stat. 951, 953; c. 503, 44 Stat. 1418; U. S. C., Title 48, Sections 741, 745, and Act No. 24 of the Legislature of Puerto Rico, approved July 16, 1935). The matter is also affected by the Act of Congress of August 3, 1935 (Pub. No. 236, 74th Cong.). The applicable provisions of these statutes are copied below.

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Act of Congress, March 2, 1917, as amended:

SECTION 3. " * * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Puerto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however*, That no public indebtedness of Puerto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Puerto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Puerto Rico has heretofore been pledged and bonds issued by the people of Puerto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Puerto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Puerto Rico is pledged shall be counted."

Act of Congress, August 3, 1935:

"That any bonds or other obligations of Puerto Rico hereafter issued for the purpose of retiring previously outstanding bonds or obligations shall not be included in computing the public indebtedness of Puerto Rico under section 3 of the Organic Act approved March 2, 1917, as amended, until six months after their issue" (49 Stat. 516).

Act of the Legislature, July 16, 1935:

"SECTION 2. The Treasurer is hereby empowered, with the approval of the Governor of Puerto Rico, to consolidate and convert any or all bond issues of The People of Puerto Rico by issuing refunding bonds on such terms and conditions as the Treasurer of Puerto Rico may, from time to time, deem most convenient and advantageous to the interests of The People of Puerto Rico; and to determine the form, dates, and denominations of any new issue issued under this Act, fixing the rate of interest and the payment thereof, the amount of the issues, the date of maturity, the form and time of amortization, the conditions of sale, the rights and conditions in regard to the redemption of the bonds, the amount of premiums thereon, if any, and any other provisions, conditions, or requirements that he may consider

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necessary or convenient for carrying out most advantageously any consolidation or conversion under this Act. The Treasurer of Puerto Rico is likewise hereby authorized and empowered to pay, and he is directed to pay, additional interest and expenses of said bonds out of any available funds in the Insular Treasury not previously appropriated for other purposes. The preceding provisions relative to the payment of the additional interest and the expenses of said bonds shall have the character of a continuous appropriation and shall constitute sufficient authority so that the Treasurer of Puerto Rico may make said payments without its being necessary for new appropriations to be made for that purpose. Said payments, however, shall be made on warrants issued by the Treasurer of Puerto Rico, signed by the Auditor, and countersigned by the Governor of Puerto Rico, in accordance with the general provisions of law in regard to the disbursement of public funds; *Provided*, that the good faith of The People of Puerto Rico is hereby irrevocably pledged for the payment of the principal of, and the interest on, said refunding bonds."

Your letter and the documents submitted by you show that the aggregate assessed valuation of real and personal property in Puerto Rico on June 30, 1935, amounted to $289,628,594, that on the said date there were outstanding bonds of the Government of Puerto Rico of the face value of $27,480,000, and notes evidencing temporary loans of the face value of $642,494.54, that since the amendatory act of March 4, 1927, the good faith of the people of Puerto Rico has been pledged to the payment of principal and interest on outstanding municipal bonds aggregating $1,198,500, which under the statute must be added to the foregoing, making a total of $29,320,994.54 as of June 30, 1935, the date of the Treasurer's certificate. Subsequently, in my opinion to you of July 9, 1935 (38 Op. 242), I approved a contemplated bond issue of $120,000, which must also be added (although the bonds have not yet been issued), making the total to be considered, therefore, $29,440,994.54. From this amount, however, there is to be deducted $348,623.83, representing the amount accumulated in the various sinking funds, pledged by statute and applicable only to the payment

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of unmatured obligations included in the foregoing total figures (35 Op. 9, 14; 37 id. 30, 32), and a further item of $250,000, representing 1914 Refunding Bonds (also included in the foregoing total figures), secured by municipal bonds held by the insular government and therefore to be deducted when ascertaining the amount of the permitted indebtedness of that government, as provded in the Act of Congress, making a net total of $28,842,370.71.

Considering the foregoing figures, it is apparent that the present indebtedness of the Government of Puerto Rico is within the maximum permitted by law (10% of the aggregate tax valuation), and the contemplated issue will not result in any increase in the indebtedness after the proceeds thereof have been applied to the retirement of bonds now outstanding. The temporary increase during the period intervening between the sale of the refunding bonds and the retirement of the bonds now outstanding is authorized by the Act of August 3, 1935, and, under the plan outlined by you, the period of this temporary increase will come well within the six months provided by the statute.

There was transmitted with your letter a statement signed by the Treasurer of Puerto Rico, setting forth his determinations in those matters left to his discretion, and this has been approved by the Governor as provided in the statute. All the requirements in these particulars have been complied with and, in my opinion, the bonds which it is proposed to issue are in accord with the provisions of the statute and the determinations of the Treasurer. The interest rate, of course, is not yet inserted, and, under the terms of the Act of the Legislature, the rate is to be fixed by the Treasurer with approval of the Governor. Acceptance of the offer of the successful bidder by the Treasurer, with approval of the Governor, will definitely fix the interest rate and satisfy the requirement in this respect.

The bonds will properly recite that "under the provisions of Section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Puerto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other

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municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia."

A further question requires notice. The Organic Act for Puerto Rico (U. S. C., Title 48, Sec. 832) provides: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The purpose of this, as pointed out in *Posados* v. *Warner, B. & Co.*, 279 U. S. 340, 344, involving a similar provision in the Organic Act for the Philippine Islands, is merely "to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation."

The Act of the Legislature is entitled: "An Act to extend the duties, powers, and faculties of the Treasurer of Puerto Rico by authorizing him to buy bonds of The People of Puerto Rico, of the Government of the Capital, or of the municipalities, in the open market; to consolidate and convert the bond issues of The People of Puerto Rico; to borrow money temporarily as an advance of taxes; to repeal Act No. 15, of April 20, 1932, and Act No. 1, of November 16, 1932, and for other purposes."

The Act contains eight sections. Only Section 2 relates to the bonds now contemplated, but the other sections relate equally to the fiscal duties of the Treasurer—the borrowing of funds, the issuance of certificates of indebtedness, the repayment of loans, and the retiring (purchasing) of outstanding obligations—with provision for repeal of conflicting statutes. All this, I think, reasonably relates to a general subject adequately expressed in the Title, within the principle laid down by the Supreme Court in the cited case.

Considering the foregoing, it is my opinion that the bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Puerto Rico.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE INTERIOR.

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VALIDITY OF PROPOSED EXECUTIVE ORDER EFFECTING AN INTERCHANGE OF PROPERTY BETWEEN THE WAR AND NAVY DEPARTMENTS

A proposed Executive order effecting an interchange of certain property between the War and Navy Departments, which interchange has been agreed to by the Acting Secretaries of the War and Navy Departments, is authorized under the following provision of the Act of July 11, 1919, 41 Stat. 131, 132:

"The interchange without compensation therefor, of military stores, supplies, and equipment of every character, including real estate owned by the Government, is hereby authorized between the Army and the Navy upon the request of the head of one service and with the approval of the head of the other service."

Since the proposed interchange of property is in the interest of the national defense, it is probable that the President is also authorized to issue the order as Commander-in-Chief of the Army and the Navy.

DEPARTMENT OF JUSTICE,
September 26, 1935.

SIR: I am herewith transmitting a revised draft of a proposed Executive order presented by the Assistant Secretary of the Navy and submitted to this Department by your Executive Clerk Mr. Forster with his memorandum of September 25, 1935.

The proposed order effects an interchange of certain property between the War and Navy Departments in California, Hawaii, and the District of Columbia. This proposed interchange of property has been agreed to by the Acting Secretary of the Navy and the Acting Secretary of War, as appears from their letter to you of September 24, 1935, and it is my view that the order is authorized under the following provision of the Act of July 11, 1919, 41 Stat. 131, 132:

"The interchange without compensation therefor, of military stores, supplies, and equipment of every character, including real estate owned by the Government, is hereby authorized between the Army and the Navy upon the request of the head of one service and with the approval of the head of the other service."

Since the proposed interchange of property is in the interest of the national defense it is probable that you also have authority to issue the order as Commander in Chief of the Army and the Navy.

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I have considerably revised the proposed order as to form only but no change has been made in its substance, and, as revised, it has my approval as to form and legality.

At the request of Mr. Forster the proposed order is being sent to you direct instead of through the Secretary of State.

Respectfully,

STANLEY REED.
Acting Attorney General.

To the PRESIDENT.

APPOINTMENT OF THE CHANCELLOR OF THE UNIVERSITY OF PUERTO RICO AS REGIONAL ADMINISTRATOR OF THE PUERTO RICO RECONSTRUCTION ADMINISTRATION

The Chancellor of the University of Puerto Rico is granted a year's leave of absence with pay to enable him to make his services available to the Puerto Rico Reconstruction Administration established by Executive order of March 28, 1935, as an agency within the Department of the Interior to carry out in Puerto Rico the purposes of the Emergency Relief Appropriation Act of 1935.

Held, the proposed appointment of the Chancellor as Regional Administrator of the Puerto Rico Reconstruction Administration without compensation is authorized by the Emergency Relief Appropriation Act of 1935; and the prohibition of Title 5 U. S. C., sec. 66, that no Government official or employee shall in connection with his services as such be paid or receive any salary from any source other than the United States Government, except as may be contributed by any State, county, or municipality, is not applicable here.

DEPARTMENT OF JUSTICE,
September 28, 1935.

SIR: I have your request of September 25 for my opinion upon a question which has arisen in the Puerto Rico Reconstruction Administration and concerns the legality of the proposed appointment of Dr. Carlos Chardon as Regional Administrator in Puerto Rico.

Dr. Chardon is Chancellor of the University of Puerto Rico. The University was created by an act of the legislature of Puerto Rico approved July 21, 1925 (Laws 1925, p. 282), derives its financial support from the insular treasury, and is governed by a Board of Trustees composed of the

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President of the Senate (of Puerto Rico) or designated representative, the Speaker of the House of Representatives or designated representative, the Commissioner of Education, the Chancellor of the University (appointed by the Trustees) and three other persons appointed by the Governor with the advice and consent of the Senate. The Trustees, by resolution, have granted Dr. Chardon a year's absence with pay, revocable at any time in their discretion. While the resolution does not so recite, it is an accepted fact that the leave was granted in order to enable Dr. Chardon to make his services available to the Puerto Rico Reconstruction Administration. The granting of leave with pay is not unprecedented at the University.

The Puerto Rico Reconstruction Administration (with an Administrator at the head thereof) was established by Executive Order No. 7057, of March 28, 1935, "as an agency within the Department of the Interior," to carry out the purposes of the Emergency Relief Appropriation Act of 1935 in Puerto Rico. The program which Dr. Chardon, as Regional Administrator, would be called upon to administer includes projects for slum clearance, the erection of low-cost housing, the construction of hydroelectric plants and transmission lines, the acquisition of farm lands and the resettlement thereon of coffee, sugar, tobacco and fruit farmers, reforestation, soil erosion work, the eradication of animal and plant pests, and also the construction of certain buildings which, when completed, will be turned over to the University of Puerto Rico for University purposes. It is stated that the total amount allowed for these projects, at the present time, is $40,522,879, and that the construction of the University buildings will involve the expenditure of $1,422,000.

The following statutory provisions have been cited to me as requiring consideration in this connection:

U. S. C., Title 5, Sec. 66. "No Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, and no person, association, or corporation

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shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States. * * * (Mar. 3, 1917, c. 163, Sec. 1, 39 Stat. 1106.)"

U. S. C., Title 31, Sec. 665. "* * * Nor shall any department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. * * *" (R. S. 3679; Mar. 3, 1905, c. 1484, Sec. 4, 33 Stat. 1257; Feb. 27, 1906, c. 510, Sec. 3, 34 Stat. 48.)

The Emergency Relief Appropriation Act (Public Resolution No. 11, 74th Congress [49 Stat. 115]), authorizes the President, in carrying out its provisions, to "accept and utilize * * * voluntary and uncompensated services," and this express authorization necessarily supersedes the earlier general inhibition upon acceptance of uncompensated service.

The other provisions, relating to compensation from sources outside the Government, are unaffected by any express language in the Emergency Relief Appropriation Act. They were considered by the Attorney General in an opinion of August 10, 1922, (33 Op. 273, 275) in connection with a proposal by private interests to pay the travelling expenses of government employees sent out from Washington at their request and for their benefit, and the following excerpt from the opinion is indicative of the probable purpose of the legislation and of the manner in which it is to be interpreted.

"This provision, it will be observed, is penal, and the law is well settled that (to paraphrase the language of Lord Coke) Acts of Congress are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endangered. The object of the provision in the Act of March 3, 1917 (ch. 163), was that no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States. Where, as in the arrangement proposed to you, the officer or employee concerned does not personally benefit by the payments from outside sources, any

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more than he would if he paid his own traveling expenses, the statute is not violated. Literally there may be said to be a 'contribution to' the officer or employee for services performed by him for the Government, but in reality the contribution is to the Government itself, and is in furtherance. not in prejudice, of its interests."

It is, I think, apparent from the face of the statute, and this was emphasized by the Attorney General in an opinion of June 16, 1919 (31 Op. 470), that the inhibition is upon the receiving, by an official or employee, of "salary *in connection with his services as such an official or employee* * * *." It was concluded that the appointment of an individual at mere nominal salary for the collection of statistics for the United States while employed and paid by private interests to collect the same statistics for them, would violate the statute; but the case here under consideration is clearly distinguishable upon the facts.

An opinion of September 25, 1920 (32 Op. 309, 310), while of doubtful pertinency, may also be noticed because presenting, in some aspects, the antithesis of the instant problem. It was proposed to grant the Chief Statistician for Vital Statistics of the Census Bureau a leave of absence without pay "to enable him to attend in an unofficial capacity an international commission which is to meet in Paris for the purpose of revising the nomenclature of diseases and causes of death," and while absent "to accept from the Red Cross or some other agency outside the Government, an amount equal to that which he would receive as salary in the bureau if not placed on leave without pay." The arrangement was held unobjectionable.

It will be observed that the statute expressly excepts contributions "out of the treasury of any state, county, or municipality." In *Wickersham* v. *Smith*, 7 Alaska 522, 541, the court said that this "impliedly allows salaries to be paid to employees from sources other than private sources." The court did not expressly indicate, nor have occasion to decide, that the sources other than private ones might include sources clearly not private yet beyond the strict letter of the exception in the Statute. I think it is safe to assume, however, that the moving purpose was to forbid payments

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and contributions from private sources; and this is supported by the holding in *United States* v. *Morse*, 292 Fed. 273, 277, that the payment of compensation to a special assistant to the Attorney General out of funds of the Emergency Fleet Corporation would not violate the statute, the court pointing out that "those funds belonged in equity to the United States, and his employment and pay cannot be regarded as by a private corporation."

Likewise, in addition to the other factors involved, the compensation received by Dr. Chardon will not come from private sources, but will be paid to him by what is virtually a department of the Government of Puerto Rico, deriving its support from that Government, and the latter is, in the final analysis, but an arm of the Federal Government, exercising limited federal powers delegated to it by the Congress.

In conclusion, it is my opinion that the employment of Dr. Chardon without compensation is expressly authorized by the Emergency Appropriation Act of 1935, and that the statutory provision forbidding the payment of salary to any government official or employee, "in connection with his services as such an official or employee," is inapplicable for the reasons hereinbefore indicated. Therefore, I perceive no legal objection to the appointment of Dr. Chardon as Regional Administrator.

Respectfully,

JOHN DICKINSON.
Acting Attorney General.

To the PRESIDENT.

AUTHORITY OF THE PRESIDENT TO DESIGNATE AN ACTING UNITED STATES HIGH COMMISSIONER TO THE PHILIPPINE ISLANDS

Neither the Act of March 24, 1934, 48 Stat. 456, providing for the independence of the Philippine Islands, nor section 179 of the Revised Statutes contains any authority for a proposed Executive order providing that in the event of a vacancy in the office of the United States High Commissioner to the Philippine Islands or the temporary disability of the High Commissioner, the Legal Adviser, or in his absence, the Financial Expert, shall perform the functions of the said office.

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DEPARTMENT OF JUSTICE,
October 2, 1935.

SIR: The Assistant Director of the Bureau of the Budget has submitted for my consideration, pursuant to Executive Order No. 6247 of August 10, 1933, the proposed executive order presented to the President by the Acting Secretary of War with his letter of September 26, 1935.

The proposed order provides that in the event of a vacancy in the office of the United States High Commissioner to the Philippine Islands or the temporary disability of the High Commissioner, the Legal Adviser, or in his absence, the Financial Expert, shall perform the functions of the said office. The Act of March 24, 1934, 48 Stat. 456, providing for the independence of the Philippine Islands, etc., is cited as authority for the order. An examination of that Act, however, fails to reveal any such authority. Although section 7 (4) provides, among other things, that the High Commissioner shall have such staff and assistants as the President may deem advisable and as may be appropriated for by Congress, including a financial expert, it does not provide for the designation of an Acting High Commissioner.

I am not aware of any other statute under which the proposed order is authorized. Section 179 of the Revised Statutes (U. S. C., Title 5, Sec. 6) provides, in effect that in case of the death, resignation, absence, or sickness of the head of any Department (except the Department of Justice) or chief of any bureau, the President may in his discretion, "authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease." The instant case, however, does not come within the provisions of that statute, for (1) the High Commissioner is not the head of a Department or the chief of a bureau, and (2) the persons designated by the proposed order (the Legal Adviser and the Financial expert) to act as High Commissioner are not heads of De-

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partments or chiefs of bureaus and are not appointed by the President by and with the advice and consent of the Senate.

In view of the foregoing, I am unable to approve the proposed order.

The proposed order, together with the above-mentioned letter of the Acting Secretary of War to the President, is herewith returned.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF WAR.

VALIDITY OF THE PROVISION IN THE EXECUTIVE ORDER OF JANUARY 15, 1917, REGARDING LEAVE IN THE CANAL ZONE

Even assuming that the statute involved herein is ambiguous, the circumstances require the application of the principle that the administrative construction of an Act of Congress is entitled to the highest respect and, if acted upon for a number of years, should not be disturbed except for very cogent reasons.

The regulation contained in paragraph 36 of the Executive order of January 15, 1917, providing for cash payments in commutation of accrued leave upon termination of the service of employees in the Panama Canal service, represents a valid exercise of authority vested in the President.

DEPARTMENT OF JUSTICE,
October 7, 1935.

SIR: I have your letter of September 25 in which you ask my opinion respecting whether the following provision, contained in Paragraph 36 of the Executive Order of January 15, 1917, "Relating to conditions of employment in the Panama Canal service", represents a valid exercise of authority vested in the President:

"When an employee's service is terminated, a cash payment in commutation of leave will be made to him for the number of days cumulative leave due, plus the annual leave due. In the event of his death his estate will be paid the sum due."

The order provides yearly for each employee twenty-four days "annual leave" thirty days "cumulative leave" (to be due each year after the completion of ten months service during the year and to be taken annually or left to accumu-

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late to the credit of the employee), and seven days of non-cumulative additional leave ("travel leave") for employees traveling to points outside the tropics, with a provision "that the maximum number of days leave with pay of all kinds which may be granted at any one time or which may be commuted into a cash payment at termination of service is 120." It is further provided that leave when earned and due "may be taken at such times and in such numbers of days as may be satisfactory to the Governor."

The documents submitted with your letter indicate that the practice of making cash payments in commutation of leave not taken, upon termination of an employee's service through death or other causes, has existed in the Panama Canal service for many years.

The chairman of the Isthmian Canal Commission in a letter of January 4, 1912, to the Comptroller of the Treasury, referred to a then existing practice of carrying upon the rolls the name of any employee leaving the service until the expiration of a period equivalent to the number of days of leave to which he might be entitled, and then sending him a check for the amount accrued at his salary rate during such period. It was proposed, beginning with October 1, 1912, to make payments covering such earned leave periods immediately upon cessation of actual service, payments so due deceased employees to be made to their estates. The chairman explained that in such case the vacancy would not be filled until the expiration of the additional leave period for which the employee was paid. He also pointed out that this would result in a decided benefit to the Commission, would prove advantageous to some "employees who have been unfortunate enough not to save an amount sufficient to carry them back to their homes or to a place where they might obtain work", and would eliminate the necessity "for the Government, in extreme cases, to send them back."

The Comptroller, responding under date of January 31, 1912, to the chairman's request for a ruling, concluded that the proposed regulation was authorized. The following statement in his letter is pertinent, as hereafter appears: "I see no distinction in principle between paying for the leave earned after October first next to a person who resigns, than to his estate where he dies."

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The principle of the regulation thus adopted with the Comptroller's approval was embodied in an Executive Order of February 2, 1914, "Providing conditions of employment for the permanent force for the Panama Canal", in the identical language later included in the order of January 15, 1917, and hereinbefore quoted.

It further appears that this provision in the Executive Order of February 2, 1914, was again considered by the Comptroller in an opinion to the Governor of the Panama Canal under date of February 9, 1915, and the following conclusion stated: "I am of the opinion that the Executive Order, *supra*, in the cases of employees coming within its terms should be construed as authorizing payment to them upon the same basis as if they had remained in the service and actually took the leave to which they were entitled. I have no doubt but that this construction was intended by the framers of the order." Payments in accordance with the regulation have continued to be made and have continued to be passed by the Comptroller and by his successor, the Comptroller General, apparently without question, until quite recently.

Under date of September 7, 1934, a former employee, who had retired from the Panama Canal service, wrote the Comptroller General, stating that upon his retirement he had received a cash payment in commutation of 118 days leave whereas, in his opinion, he should have received such payment on the basis of 120 days, and requesting the Comptroller General's decision concerning his claim for "the two days pay withheld by the paymaster." The Comptroller General thereupon wrote the Governor of the Panama Canal under date of December 8, 1934, concluding as follows:

"You are advised * * * that while it is proper to give employees of the Panama Canal who are about to resign or to become involuntarily separated from the service, the benefit of the accrued leave by granting them the leave that has been earned and making the separation effective at the expiration of the leave granted, in the absence of a statute specifically so providing, the administrative practice of paying the former employees or to the estates of former employees, after separation from the service by retirement, resignation, death or otherwise, the commuted value earned

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but not taken prior to the effective date of such separation, must be discontinued.

"There will not be questioned such payments heretofore made, if otherwise properly within the administrative regulations * * *."

The Governor protested. The Comptroller General responded, on February 12, 1935, that the ruling must stand, but stated:

"However, in view of the extended period over which the erroneous administrative practice has prevailed no objection will be raised in the audit of the accounts to payments made prior to July 1, under such procedure and in connection with separations hereafter occurring or that occurred since date of decision, December 8, 1934, where it is shown that it was impossible to grant the accrued leave prior to the separation date in the particular case."

Concerning the statutory authority for the regulation, there is first to be noticed the so-called Spooner Act of June 28, 1902, c. 1302, 32 Stat. 481, 482, entitled "An Act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific Oceans." It authorized the purchase of the rights of the New Panama Canal Company, of France, and a right-of-way from the Government of Colombia; enabled and directed the President to construct a canal; created the Isthmian Canal Commission, through which he was to do the work; and provided "that the President is authorized for the purposes aforesaid to employ such persons as he may deem necessary, and to fix their compensation."

Subsequently Panama revolted from Colombia, was recognized by the United States, and by treaty transferred to the United States perpetual control of the Canal Zone. A statute enacted on April 28, 1904, c. 1758, 33 Stat. 429, made further provision for the building of the Canal and authorized the President, "until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress", to exercise military, civil, and judicial powers, etc.

Although the 1904 statute expired on March 4, 1905, no further pertinent legislation was passed until August 24, 1912 (c. 390, 37 Stat. 560), when the Panama Canal Act

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became law, with provisions hereinafter noted. In the meantime, however, a Government was organized; law and order were maintained; numerous regulations were made and enforced, and persons violating them were prosecuted and convicted; the Attorney General had concluded in an opinion of January 30, 1907 (26 Op. 113), that the expired statute of 1904 was merely declaratory of what would have been the authority and duty of the President growing out of the Treaty and the Spooner Act even if the 1904 statute had not been passed; the same grounds had been stated by the President as the source of the authority being exercised by him, when responding to a resolution by the House of Representatives (42 Cong. Rec. 3592, 4387); and the Congress, with full knowledge of the facts and the existing legislative situation, had continued to provide money for the building of the Canal and the government of the Canal Zone, including the employment of the necessary personnel. *McConaughey* v. *Morrow*, 263 U. S. 39, 46.

The Panama Canal Act, *supra*, passed when the Canal was nearing completion, contained in sections 2 and 4 the following provisions:

"SEC. 2. That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. * * *" (37 Stat. 561).

"SEC. 4. That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, govern-

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ment, and protection of the Canal and Canal Zone. * * * All other persons [persons other than the Governor] necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States. * * *"

In *McConaughey* v. *Morrow*, *supra*, a Government employee in the Canal Zone, claiming to act in behalf of himself and all other Government employees occupying Government quarters in the Zone, sought to restrain the Governor and other officials from effectuating an order of the President of December 3, 1921, making them chargeable for rent, fuel, electric current, water and services in connection with their quarters on and after January 1, 1922, upon the ground that they had been entitled to these facilities and services incident to their employment under orders in effect prior to the passage of the Panama Canal Act, and that Section 2 thereof expressly continued all such orders in effect until otherwise provided by the Congress. The Supreme Court, after reviewing the history of the Canal building and government, stated the following conclusions:

"From this review of the history of the Canal Zone government, the purpose of Congress in enacting the second section of the Canal Act of 1912 must be apparent. *There had been no lack of authority in the President after the Spooner Act to build the Canal and employ those who were to do the work.* The defect was in the lack of definite authority to create a government, make laws and enforce them, and this had to be spelled out. Congress deemed it wise, therefore, as it certainly was, to ratify and confirm everything two Presidents had done in carrying on government and making and enforcing law in the Zone. It

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is in the light of this that the second section must be interpreted. The section confirms 'all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone and the construction of the Panama Canal.' This means laws needed and enacted to constitute the government, promote sanitation and generally aid the construction of the Canal. It was intended to ratify that as to the validity of which doubt had been expressed. *It was only those regulations* which rose to the dignity of laws which required ratification. To give the construction to § 2 contended for by appellant would lead to a most absurd result in view of its closing words which ratified and confirmed such laws, rules, regulations and ordinances 'as valid and binding until Congress shall otherwise provide.' This would be to put innumerable administrative orders and rules adopted in the work, which were necessarily subject to change from time to time as conditions changed and the work progressed, into a strait-jacket, entirely inconsistent with the broad authority of the President granted in the Spooner Act and renewed in § 4 of the same Canal Act of 1912 * * *." [Italics supplied.]

The House Committee on Interstate and Foreign Commerce, when reporting the bill which became the Panama Canal Act (H. Rept. 423, 62d. Cong., 2d. Sess.), pointed out that—

"The Panama Canal is unique in all respects, and at every stage presents novel problems. Its initiation involved intricate questions requiring skillful diplomacy and tactful legislation. Its construction encountered untried difficulties and invented original methods and processes without the aid of model or previous suggestion. Likewise legislation to operate and govern the gigantic institution, with its adjuncts and incidents, must, in the absence of precedent, rely upon basic principles, with analogy and reason as the only guide."

Among the problems involved was the employment in the tropics of men from our more temperate latitudes. To induce them to accept employment, to keep them in the service, to maintain their health and their morale, bore

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essentially upon the accomplishment of the great engineering tasks. The Congress did not expressly provide that the President should grant leave to employees and did not prescribe terms and conditions of employment, but necessarily such authority was to be implied; and it was in the very nature of things that the rules adopted, respecting men transported long distances from their homes for employment in an unaccustomed climate, would differ from those generally prevailing in the Departments at Washington.

Relatively generous leave, with assurance that it would be granted or compensation allowed for non-user or loss of it, related directly to the considerations mentioned in the preceding paragraph. It is also to be accepted, I think, that prudent employment of men in such circumstances warranted reasonable provisions against the contingency that they, or in the event of their decease their families, might be charges upon the Government on termination of their services, through its failure to provide the means of returning home or going to some other place where employment could be had; and these considerations, apparently, were moving factors in the original adoption of the provision for cash payment, upon termination of services, in commutation of earned leave not taken.

It was no more necessary for the Congress to make express provision for these than for the thousands of other details involved in the employment of the necessary men and in the building of the canal. The authority concerning each was equally broad and unhampered by minute specifications and, as the Supreme Court pointed out, the legislative hiatus between 1904 and 1912 did not extend to matters relating to construction and employment.

It is to be noted also that cash payment in commutation of leave was not unprecedented in the Government service. The Act of June 11, 1896, c. 420, 29 Stat. 413, 454, provided, in connection with leave for the employees at the Government Printing Office, that "the Public Printer is hereby authorized to pay to the legal representatives of any employees who have died during the fiscal years of eighteen hundred and ninety-four, eighteen hundred and ninety-five, eighteen hundred and ninety-six, or may hereafter die, who

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have or hereafter may have any accrued leave of absence due them as such employees, and said claims to be paid out of any unexpended balances of appropriations for the payment of leaves of absence to the employees of the Government Printing Office * * *."

Of course, the regulation of employment, including the granting and commutation of leave, at the Government Printing Office was dependent upon express legislation. In the Canal Zone the whole matter was left to the discretion of the President.

The Comptroller General has stated that the matter is now governed by the provision in Section 4 of the Act of August 24, 1912, concerning the fixing of compensation by the President, which, he says, "does not include the authority to grant cash gratuities to former employees or to the estates of former employees." But compensation paid because of actual performance of duty for periods when the employee was legally excusable from performance of duty under the conditions of his employment is hardly to be termed a "gratuity", if the regulation prescribing the conditions was authorized. The Comptroller General's theory, apparently, is that the regulation is not valid because, even assuming it to have been authorized under the powers exercised by the President prior to August 24, 1912, the authority did not exist thereafter.

It was administratively considered, however, that the regulations concerning employment conditions—regulations such as that dealt with in *McConaughey* v. *Morrow*, which did not rise to the dignity of laws and therefore did not require ratification—continued in effect, except as necessarily modified by the 1912 statute, until thereafter modified or repealed by the President or by further enactment of the Congress; and the reasoning of the Supreme Court in the cited case indicates that it accepted this view. Section 4, of course, modified any prior conflicting regulation fixing compensation in excess of the maximum therein provided; but there is no more reason for believing that it invalidated the regulation providing for commutation of leave than there is for believing that it invalidated the regulation providing quarters and fuel, electric current, water, and services in con-

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nection therewith, which latter regulation was treated in *McConaughey* v. *Morrow* as having remained in effect, being modified by the President's Order of December 3, 1921.

It was a major purpose of the 1912 statute to ratify regulations theretofore made, not to invalidate them, and the Supreme Court stated that "the broad authority of the President granted in the Spooner Act"—which authority, it indicated, was broad enough to support the regulations concerning employment conditions, beyond need of ratification—was "*renewed* in Section 4 of the * * * Act of 1912."

It is furthermore, to be remembered that the view which I take of the matter, and which finds support in the Supreme Court's opinion, has been administratively entertained and applied during approximately a quarter of a century, and payments on the basis thereof have continued to be made and passed by the Comptroller and by his successor, the Comptroller General. The regulations involved have been duly published in Executive Orders, and knowledge of them and of the practice which they support must be attributed to the Congress. Yet there has been no question respecting them from any source, insofar as I am aware, until that recently raised by the Comptroller General as indicated above.

In such circumstances, even assuming that there may have been some uncertainty in the beginning, it is now required that we apply the principle so often stated by the courts and by my predecessors, as indicated by the following:

Attorney General Taney, 2 Op. 558:

"Whenever an act of Congress has, by actual decision, or by continued usage and practice, received a construction at the proper department, and that construction has been acted on for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it."

Swendig v. *Washington Co.*, 265 U. S. 322, 331:

"It is a 'settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will

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not be disturbed except for very cogent reasons.' *Logan* v. *Davis*, 233, U. S. 613, 627."

Considering the foregoing, it is my opinion that the regulation contained in Paragraph 36 of the Executive Order of January 15, 1917, hereinbefore quoted, represents a valid exercise of authority vested in the President.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF WAR.

AUTHORITY OF BUREAU OF RECLAMATION TO CONSTRUCT THE GRAND LAKE-BIG THOMPSON TRANSMOUNTAIN DIVERSION PROJECT

The Congress has recognized the distinction between a reclamation project and a power project (Reclamation Act of June 17, 1902, and Federal Water Power Act of June 10, 1920).

The authority of the Reclamation Service under the Act of January 26, 1915 (38 Stat. 798) to enter upon and utilize for flowage or other purposes any area within the Rocky Mountain National Park necessary for the development and maintenance of a Government reclamation project, is not affected by the Act of March 3, 1921 (41 Stat. 1353) limiting the power of the Federal Water Power Commission in certain respects.

If the proposed Grand Lake-Big Thompson Transmountain Diversion Project is in fact a "Government reclamation project" the Bureau of Reclamation is authorized to enter upon and utilize any area within the Rocky Mountain National Park which may be necessary for the development and maintenance of such project.

DEPARTMENT OF JUSTICE,
October 7, 1935.

SIR: I have your letter of August 21, 1935, in which you state that your Solicitor has advised you in an opinion dated July 19, 1935, copy of which you enclosed, that the proviso of the Act of January 26, 1915, 38 Stat. 798 (U. S. C., Title 16, Sec. 191), authorizing the Reclamation Service to enter upon and utilize any area within the Rocky Mountain National Park necessary for the development and maintenance of a Government reclamation project, contains existing authority for the Reclamation Bureau to enter upon the park

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area and prosecute the proposed Grand Lake-Big Thompson Transmountain Diversion Project, which the Bureau of Reclamation now has under consideration.

You refer to the Attorney General's opinion of May 3, 1921 (32 Op. 525), in which it was held that the Federal Water Power Act of June 10, 1920 (41 Stat. 1063; U. S. C., Title 16, Sec. 792 *et seq.*, c. 12), expressly repealed all acts inconsistent therewith. In view of that decision you express a doubt as to the authority of the Bureau of Reclamation to prosecute the proposed project in the Rocky Mountain National Park area without specific authority of the Congress, and request my opinion upon the subject.

The Reclamation Act of June 17, 1902 (32 Stat. 388; U. S. C., Title 43, Sec. 416 *et seq.*, c. 12), as amended, "outlines a comprehensive reclamation scheme, and provides for the examination and survey of lands and for construction and maintenance of irrigation works for the storage, diversion and development of water for the reclamation of arid and semiarid lands" (*Henkel* v. *United States*, 237 U. S. 43, 49). The Act expressly defines the word "project" as therein used to mean "a federal irrigation project authorized by the reclamation law" (U. S. C., Title 43, Sec. 371). Work under the Act is carried on by the Bureau of Reclamation under the supervision of the Secretary of the Interior.

The Act of January 26, 1915 (38 Stat. 798), establishing the Rocky Mountain National Park, expressly provides as follows:

"Provided, That the United States Reclamation Service *may enter upon and utilize* for flowage or other purposes any area within said park which may be necessary for the development and maintenance of a Government reclamation project." [Italics supplied.]

By the Federal Water Power Act of June 10, 1920 (41 Stat. 1065; U. S. C., Title 16, Sec. 797), the Federal Water Power Commission was authorized to make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location,

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capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power.

By the same section of the Act the Commission was authorized to issue revocable licenses to citizens of the United States, or to any association of any such citizens, or to any corporation organized under the laws of the United States or of any State thereof, or to any State, or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of public lands and reservations of the United States, or for the purpose of utilizing the surplus water or water power from any Government dam; provided that licenses should be issued within any reservation only after a finding by the Commission that it would not interfere with the purpose for which such reservation was created, and should be subject to such conditions as the Secretary of the department under whose supervision such reservation fell should deem necessary for the adequate protection and utilization of it.

The Federal Water Power Act (41 Stat. 1064; U. S. C., Title 16, Sec. 796), expressly defines the word "project" as follows:

"'Project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands, the use and occupancy of which are neces-

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sary or appropriate in the maintenance and operation of such unit."

The Act of March 3, 1921 (41 Stat. 1353; U. S. C., Title 16, Sec. 797) provides as follows:

"That *hereafter no permit, license, lease, or authorization* for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as now constituted of any national park or national monument *shall be granted or made without specific authority of Congress, and so much of the Act of Congress* approved June 10, 1920, entitled 'An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes', approved June 10, 1920, *as authorizes licensing* such uses of existing national parks and national monuments *by the Federal Power Commission is hereby repealed.*" [Italics supplied.]

Since the United States Reclamation Service, by the above quoted provision in the Act of January 26, 1915, establishing the Rocky Mountain National Park, is expressly authorized to enter the park and utilize for flowage or other purposes any area necessary for development of a "Government reclamation project", it seems clear that its authority thereunder was not affected by the Act of March 3, 1921, *supra*, which merely provides that thereafter no "permit, license, lease, or authorization" for the uses of national parks and monuments therein enumerated should be "granted or made without specific authority of Congress", and withdrew the authority of the Federal Power Commission to issue licenses for such uses of existing national parks and national monuments. By the Act of January 26, 1915, *supra*, Congress already had conferred "specific authority" on the United States Reclamation Service "to enter upon and utilize" for the purposes specified any area within the Rocky Mountain National Park, and as heretofore noted, the Congress has expressly recognized the distinction between a "reclamation project" and a "power project." There is no indication

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that the Congress by the Federal Water Power Act, *supra*, intended to transfer to the Federal Power Commission the administration of the "development and maintenance of a Government reclamation project" in the Rocky Mountain National Park. On the contrary, it seems plain that the Congress intended to leave administration of any such project in that park to the United States Reclamation Service to which it theretofore specifically had entrusted it.

It is my opinion, therefore, that if the proposed Grand Lake-Big Thompson Transmountain Diversion project is in fact a "Government reclamation project", that is, "a federal irrigation project authorized by the reclamation law", the Bureau of Reclamation, by virtue of the above quoted provision of the Act of January 26, 1915, is authorized to enter upon and utilize any area within the Rocky Mountain National Park which may be necessary for the development and maintenance of such project. In determining whether the proposed project is a "Government reclamation project" consideration should be given to the case of *Kansas* v. *Colorado*, 206 U. S. 46.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE INTERIOR.

AUTHORITY OF RECONSTRUCTION FINANCE CORPORATION TO MAKE LOANS TO RAILROADS MATURING AFTER JANUARY 31, 1945

Under section 5 of the Reconstruction Finance Corporation Act (47 Stat. 5) as amended by section 4 (a) of the Act of January 31, 1935, Public No. 1, 74th Congress, the Reconstruction Finance Corporation may make loans to railroads maturing after January 31, 1945

DEPARTMENT OF JUSTICE,
October 8, 1935.

SIR: I have the letter of your Assistant Secretary Mr. Marvin H. McIntyre in which my opinion is requested on the question presented by the Chairman of the Reconstruction Finance Corporation in his letter to you of September 26, 1935.

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The Chairman of the Reconstruction Finance Corporation states that the Great Northern Railway Company has a bond issue of $105,859,000 maturing July 1, 1936, and has advised that it will need the assistance of the Corporation in meeting the maturity. It is further stated that the plan of the refinancing will take the form of a bond issue maturing after January 1, 1945, and that it will be necessary, if the Interstate Commerce Commission shall approve, for the corporation to take part of the issue. The question presented is whether the Reconstruction Finance Corporation may, with the approval of the Interstate Commerce Commission, make loans to railroads without limitation as to maturity date pursuant to section 5 of the Reconstruction Finance Corporation Act, as amended by the act of January 31, 1935 (Public, No. 1, 74th Congress; 49 Stat. 1, 3).

Prior to the said act of January 31, 1935, there was nothing in the language of section 5 of the Reconstruction Finance Corporation Act (47 Stat. 5, 6) as amended to take loans to railroads out of the general class of loans made under the section insofar as the limitation as to final maturity was involved. Until that time all loans made by the Corporation under the said section, including loans to railroads, were limited as to final maturity to February 1, 1940, and the pertinent provisions of the section with respect to loans to railroads were as follows:

"Within the foregoing limitations of this section, the corporation may also, upon the approval of the Interstate Commerce Commission, make loans to aid in the temporary financing of railroads and railways engaged in interstate commerce, to railroads and railways in the process of construction, and to receivers of such railroads and railways, when in the opinion of the board of directors of the corporation such railroads or railways are unable to obtain funds upon reasonable terms through banking channels or from the general public and the corporation will be adequately secured: * * *" (47 Stat. 7).

The said section was, however, considerably amended by sections 3 and 4 (a) of the act of January 31, 1935. Section 3 of that Act is as follows:

"Notwithstanding any other provision of law limiting the maturity of obligations taken by it to shorter periods,

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the Reconstruction Finance Corporation may make loans or advances or renewals or extensions thereof to authorized borrowers or by other suitable agreement permit them to run so as to mature at such time or times as the Corporation may determine, not later than January 31, 1945: *Provided*, That in respect of loans or renewals or extensions of loans or purchases of obligations under section 5 of the Reconstruction Finance Corporation Act, as heretofore and herein amended (U. S. C., Supp. VII, Title 15, c. 14), to or of railroads, the Corporation may require as a condition of making any such loan or renewal or extension for a period longer than five years, or purchasing any such obligation maturing later than five years from the date of purchase by the Corporation, that such arrangements be made for the reduction or amortization of the indebtedness of the railroad, either in whole or in part, as may be approved by the Corporation after the prior approval of the Interstate Commerce Commission" (49 Stat. 2).

Section 4 (a) of the said Act strikes out the above-quoted provision of section 5 of the Reconstruction Finance Corporation Act and inserts in lieu thereof the following:

"Within the foregoing limitations of this section, the Corporation, *notwithstanding any limitation of law as to maturity, with the approval of the Interstate Commerce Commission, including approval of the price to be paid, may*, to aid in the financing, reorganization, consolidation, maintenance, or construction thereof, *purchase* for itself, or for account of a railroad obligated thereon, *the obligations of railroads* engaged in interstate commerce, including equipment trust certificates, or *guarantee the payment of the principal of, and/or interest on, such obligations*, including equipment trust certificates, *or*, when, in the opinion of the Corporation, funds are not available on reasonable terms through private channels, *make loans, upon full and adequate security to such railroads* or to receivers or trustees thereof for the purposes aforesaid: *Provided, That in the case of loans to or the purchase or guarantee of obligations*, including equipment trust certificates, of railroads not in receivership or trusteeship, *the Interstate Commerce Commission shall, in connection with its approval thereof*, also certify that such railroad, on the basis of present and pros-

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pective earnings, may reasonably be expected to meet its fixed charges, without a reduction thereof through judicial reorganization, except that such certificate shall not be required in case of such loans made for the maintenance of, or purchase of equipment for, such railroads: *And provided further*, That for the purpose of determining the general funds of the Corporation available for further loans or commitments, such guaranties shall, to the extent of the principal amount of the obligations guaranteed, be interpreted as loans or commitments for loans: *Provided further*, That the total amount of loans and commitments to railroads, receivers, and trustees, and purchases and guaranties of obligations of railroads, under this paragraph, as amended, shall not exceed at any one time $350,000,000, in addition to loans and commitments made prior to the date of enactment of this Act and renewals of loans and commitments so made:" [Italics supplied.]

It is clear that if section 3 of the act of January 31, 1935, had stood alone and if section 4 (a) of the said Act had not been enacted, loans to railroads would have been limited as to maturity to January 31, 1945. Sections 3 and 4 (a) must, however, be read together, and full effect given to each, and to every part of each, if possible. By so reading them it seems obvious that the purpose of the Congress in enacting section 4 (a) was to differentiate loans to railroads from other loans made under section 5 of the Reconstruction Finance Corporation Act, and to free such loans from the general limitation as to maturity contained in said section. Any other construction would require, it seems to me, a complete disregard of the words "notwithstanding any limitation of law as to maturity." Moreover, since section 4 (a) follows immediately after section 3, the Congress, undoubtedly, had in mind the limitation set forth in section 3 when it used the words "notwithstanding any limitation of law as to maturity".

As I read section 5 of the Reconstruction Finance Corporation Act as now amended, it provides that "to aid in the financing, reorganization, consolidation, maintenance, or construction" of railroads the Corporation "with the approval of the Interstate Commerce Commission, including approval of the price to be paid," may, "nothwithstanding

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any limitation of law as to maturity", (1) *purchase* the obligation of railroads, (2) *guarantee* the payment of the principal of, and/or interest on, obligations of railroads, and (3) *make loans* to railroads.

It might be argued that the words "notwithstanding any limitation of law as to maturity", inasmuch as they are followed by and coupled with the words "with the approval of the Interstate Commerce Commission, including approval of the price to be paid", apply only to the purchase of obligations of railroads and not to loans, since the words "including the price to be paid" are applicable to purchases only and cannot be made to apply to loans.

This reasoning, however, would lead to the conclusion that the approval of the Interstate Commerce Commission is required solely with respect to purchases of obligations and not with respect to loans or guaranties, inasmuch as the words "with the approval of the Interstate Commerce Commission" are also coupled with the words "including approval of the price to be paid." It is clear, however, that the Congress intended that section 5 as amended should require the approval of the Interstate Commerce Commission not only with respect to purchases of railroad obligations but also with respect to both loans to railroads and guaranties of their obligation, since that section further expressly provides "that in the case of *loans* to or the *purchase* or *guarantee* of obligations * * * of railroads not in receivership or trusteeship, *the Interstate Commerce Commission shall, in connection with its approval thereof* also certify * * *." [Italics supplied.]

Since, therefore, the three phrases, (1) "notwithstanding any limitation of law as to maturity", (2) "with the approval of the Interstate Commerce Commission", and (3) "including the approval of the price to be paid", are inseparable, and since the phrase "with the approval of the Interstate Commerce Commission" is clearly applicable to loans and guaranties as well as to purchases of obligations, it follows that the phrase "notwithstanding any limitation of law as to maturity" is applicable to loans to railroads as well as to guaranties and purchases of railroad obligations.

It may also be argued that the words "notwithstanding any limitation of law as to maturity" apply to guaranties

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and purchases but not to loans, for the reason that a direct reference to loans to railroads is made in section 3 which fixes the limitation as to maturity, and that because of this reference loans are expressly limited as to maturity by that section, while guaranties and purchases of railroad obligations to which no such reference is made in section 3 are not so limited. Under such construction, however, loans to railroads would be limited as to maturity to January 31, 1945, while guaranties of the obligations of railroads would not be subject to any limitation as to maturity. There would seem to be no reason for such a distinction, and I find it difficult to believe the Congress intended to make it arbitrarily.

It is my opinion, therefore, that under section 5 of the Reconstruction Finance Corporation Act as now amended the Corporation may make loans to railroads maturing after January 31, 1945, provided such loans are approved by the Interstate Commerce Commission. The Interstate Commerce Commission may, of course, as a condition precedent to the approval of any such loan require that the maturity date be such as it deems reasonable.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the PRESIDENT.

GUARANTY BY THE UNITED STATES OF THE DEBENTURES OF THE FEDERAL HOUSING ADMINISTRATOR

If the Federal Housing Administrator should fail, upon demand by a bona fide and accredited holder of debentures of the Federal Housing Administration, to pay either principal or interest when due, the United States would thereupon become obligated under its guaranty to make such payments; and such obligation of the United States would not be conditioned upon the institution of any proceeding by the holder of the debentures against the Administrator or against the fund set up as provided in the statute.

DEPARTMENT OF JUSTICE.
October 9, 1935.

SIR: I have your letter of September 23 in which you ask my opinion upon a question arising under Section 204 of the National Housing Act (approved June 27, 1934).

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That section provides, regarding certain debentures to be issued by the Federal Housing Administrator:

"All such debentures shall be subject only to such Federal, State, and local taxes as the mortgages in exchange for which they are issued would be subject to in the hands of the holder of the debentures and shall be a liability of the Fund only; except that debentures issued in exchange for mortgages insured under this section prior to July 1, 1937, shall be fully guaranteed as to principal and interest by the United States. In the event that the amount in the Fund is insufficient to pay upon demand, when due, the principal of or interest on any debentures so guaranteed, the Secretary of the Treasury shall pay to the holders the amount thereof which is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such debentures" (48 Stat. 1249).

You state, "It is the view of the Treasury that should the Administrator, for any reason whether or not due to the insufficiency of the fund, fail to pay upon demand when due the principal of or interest on obligations issued under the section referred to, the United States would be required immediately to make such payment without any prior obligation on the part of the holders to endeavor to collect against the Administrator or the fund," but you desire my opinion as to the correctness of the view thus entertained in your Department.

In an opinion to you of September 14, 1934 (38 Op. 75), I responded to a similar inquiry in connection with the guaranty provided in the following language, appearing both in the Home Owners' Loan Act of 1933, as amended by the Act of April 27, 1934 (48 Stat. 128, 643), and in the Federal Farm Mortgage Corporation Act [approved January 31, 1934, 48 Stat. 344]:

"Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof * * *. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on,

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such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds."

The following paragraphs are copied from that opinion:

"Of course, as you point out, no such failure has arisen and probably never will arise; and it might be said that there is pending before you no question upon which my opinion may properly be requested. However, I acquiesce in your view that it is in the interest of the United States, as the sole stockholder in each of these corporations as well as the guarantor of their obligations, to have the question decided now.

"The guaranty of principal and interest is a guaranty of payment. *Greysonia-Nashville Lumber Co.* v. *Goldman*, 247 Fed. 423, 427. Between private parties, at least, if the guaranty is 'unconditional' the obligation of the guarantor arises immediately upon failure of the debtor to pay according to the terms. *First National Bank* v. *Jones*, 219 N. Y. 312, 315.

"The guaranty being stated by the statute as full and unconditional, there is no occasion to consider whether a condition should be implied. The separable provision that the Secretary of the Treasury shall pay if the corporation is unable to pay upon demand is no part of the guaranty, but merely a provision for carrying it out in the only reasonably conceivable contingency that would require such action."

The same observations and the same reasoning are also applicable here.

Under the Home Owners' Loan Act and the Federal Farm Mortgage Corporation Act the bonds are "fully and unconditionally guaranteed," while the debentures provided for in the National Housing Act are "fully guaranteed;" but this difference, in my opinion, is immaterial. A "full guaranty" is "unconditional" unless some condition is attached; and the statute neither provides a condition nor contains any language from which one might reasonably be implied. *First National Bank* v. *Jones*, cited in the opinion of Sep-

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tember 14, 1934, dealt with a guaranty which the court construed to be unconditional, although the words of the contract were, "I do hereby guarantee the full, prompt, and ultimate payment," and the principal difficulty turned upon the use of the word "ultimate." There was no suggestion that a guaranty in order to be unconditional must be expressly stated as unconditional.

It is therefore my opinion—and in this I concur in the conclusion of your Acting General Counsel—that if the Federal Housing Administrator should fail, upon demand by a bona fide and accredited holder, to pay either principal or interest when due, the United States would thereupon become obligated to make such payments and its obligation would not be conditioned upon the institution of any proceeding by the holder against the Administrator or against the fund set up as provided in the statute.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

CLAIM ARISING OUT OF A BRITISH SEIZURE OF LEAD SHIPPED ON THE GERMAN VESSEL "KRONPRINZESSIN CECILIE" IN 1914

The United States and Great Britain, by an informal exchange of notes dated May 19, 1927, agreed that neither country would press any diplomatic claim or request arbitration on behalf of a citizen alleging loss or damage through war measures adopted by the other, and that such claims of citizens would be referred for final settlement to the proper judicial or administrative tribunal of the Government against which the claim was asserted. However, the United States reserved the right to satisfy disallowed claims of American citizens out of moneys saved to it through a certain waiver on the part of the British Government.

Held, that such reservation contemplates exceptional cases, readily distinguishable, and does not warrant examination in this country of every adjudication of British courts unfavorable to American claims.

Held, further, that the questions submitted in connection with the claim of the American Smelting and Refining Company arising out of a British seizure of lead shipped on the German vessel *Kronprinzessin Cecilie*, in 1914, do not require specific determination.

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DEPARTMENT OF JUSTICE,
October 10, 1935.

SIR: On August 6 you requested my opinion upon the questions hereinafter indicated, and I also have your further letter of August 26, submitting additional information with respect thereto (your reference Le 441.11 Am 36/10).

It appears that the American Smelting and Refining Company, in 1914, shipped 350 tons of lead on the German steamship *Kronprinzessin Cecilie* for delivery to the Metallgesellschaft, in Germany. The vessel and cargo were captured and condemned by the British authorities; and the judgment of the British Prize Court, rendered on November 29, 1915, was affirmed by the Judicial Committee of the Privy Council upon appeal in February, 1917. The American Company participated in the proceedings, asserting that the lead had not been paid for and that "under the transaction in question, the Metallgesellschaft could only acquire title to the said lead by the payment by it, or some one in its behalf, of the demand draft" covering the value of the shipment. It was also contended that the Metallgesellschaft was an agent, rather than a vendee. The Prize Court concluded, however (and its conclusion was affirmed, upon the appeal), that the title had passed and that the lead was the property of the Metallgesellschaft at the time of the seizure. *Part Cargo ex Steamship Kronprinzessin Cecilie*, Lloyd's Reports of Prize Cases, vol. IV, pp. 409, 425.

Ten years later, by an informal exchange of notes between the United States and Great Britain, signed May 19, 1927, an agreement was reached concerning claims by citizens of either country against the government of the other arising out of measures adopted during the World War. (Treaty Series No. 756.) The following is copied from the note addressed by the Secretary of State to the British Ambassador:

"With the exceptions stated in Article II hereof His Majesty's Government in Great Britain and the Government of the United States agree:

* * * * *

"That neither will present any diplomatic claim or request international arbitration on behalf of any national

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alleging loss or damage through the war measures adopted by the other, any such national to be referred for remedy to the appropriate judicial or administrative tribunal of the Government against which the claim is alleged to lie, and the decision of such tribunal or of the appellate tribunal, if any, to be regarded as the final settlement of such claim, it being understood that each Government will use its best endeavours to secure to the nationals of the other the same rights and remedies as may be enjoyed by its own nationals in similar circumstances, and that His Majesty's Government in Great Britain agrees that fullest access to British Prize Courts shall remain open to claimants subject to the right of the British authorities to plead any defences that may be legally open to them. [Art. I, par. (2).]

* * * * *

"I desire to record the fact that the Government of the United States will regard the net amount saved to it through the above-mentioned waiver by His Majesty's Government of outstanding claims against the Government of the United States as intended for the satisfaction of those claims of American nationals falling within the scope of paragraph (2) of Article I of the agreement, which the Government of the United States regards as meritorious and in which the claimants have exhausted their legal remedies in British courts, in which no legal remedy is open to them, or in respect of which for other reasons the equitable construction of the present agreement calls for a settlement. Consequently, I take pleasure in assuring you that the Government of the United States will recommend such action by Congress as will insure the utilization for the purpose just mentioned of the sums saved to the United States under the provisions of the present agreement, and that it will also safeguard His Majesty's Government against possible double liability by exacting an assignment to the Government of the United States of all of a claimant's rights and interests in the claim in question as a condition precedent to the allowance of any compensation in respect thereof."

The American Smelting and Refining Company has now presented its claim to your Department as a "meritorious" one in which it has exhausted its legal remedies in the British

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courts, within the contemplation of the reservation contained in the foregoing agreement; and you have requested my opinion upon the questions indicated in the following paragraph of your letter of August 6:

"I should be pleased to have you examine the enclosed documents and to receive an expression of your views as to whether the arrangement between the company and the Metallgesellschaft under which the lead was shipped, was at the time of shipment, an agreement in contravention of the anti-trust laws of the United States. If not, I should be pleased to receive an expression of your opinion as to whether you think title to the lead in question at the time of capture was vested in the American company or in the German Metallgesellschaft."

If the American Smelting and Refining Company has a valid claim, it is, in the first place, a claim against the British Government and, under the terms of the 1927 agreement, is "to be referred for remedy to the appropriate judicial or administrative tribunal of the Government against which the claim is alleged to lie." The claimant assumes that its case comes within the language of the agreement, although it had invoked the aid of the British Courts before the agreement was made and therefore has not, literally, invoked their aid *under the agreement.* A case may be conceived in which it would be material whether the aid of the courts had been invoked before or after the agreement—as, for example, if a right or remedy were initially created by the agreement. I assume, however, for present purposes that the claim is to be regarded as having been referred to the British Courts in accordance with the 1927 agreement. This view was tacitly accepted in the case of the steamship *Edna*, hereinafter mentioned.

The agreement provided that the adjudications of the American and British Courts, respectively, should be regarded as effecting "final settlement", and the reservation by the American Government is not to be given so broad an effect as to destroy completely the ordinary significance of these words. Their ordinary significance would be destroyed, however, if every adjudication in the British courts unfavorable to American claimants were to be examined in

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this country and, in effect either affirmed or set aside. I think the required conclusion in that the reservation relates to exceptional cases, reasonably distinguishable.

There is nothing suggested in your letters or in the documents submitted therewith to distinguish this claim from others. It is not contended that there was a lack of remedy, or any irregularity, or any obstacle to full and free participation in the proceedings, and no such thing is indicated by the record (a transcript of which has been examined).

Upon inquiry at your Department, I am referred to only one claim as entertained by this Government under the reservation in the 1927 agreement. In that case the American-owned steamship *Edna* had been seized by the British authorities, held and used for three years, and then deturned without compensation for the loss of use. The British courts disallowed such compensation on the ground that "there was probable cause for the capture and * * * the claimants took no steps to accelerate the prolonged Prize Court proceedings." (H. Rept. 1358, 74th Cong., 1st Sess.) It appears to have been considered that, notwithstanding the lack of diligence on the part of the claimants, there were some equities in their favor, but the State Department and the claimants were unable to arrive at an agreement. The President referred the matter to the Honorable John Clark Knox, United States District Judge in New York, as Arbitrator, and his decision, rendered on December 22, 1934, was transmitted to the Congress by the President under date of April 22, 1935 (H. Rept. 1358, supra). The following paragraphs are copied from the opinion:

"Claimants' second proposition—to the effect that, since Great Britain profitably used the *Edna* for 3 years, claimants are entitled to compensation, whether by way of damages or otherwise—is one for which I feel a measure of sympathy.

"The lapse of time that occurred before the prize court proceedings were concluded led Lord Sumner to comment upon the fact. He attributed the fault for delay to claimant's failure to take active steps to accelerate disposition of the cause. In part, I agree with him. I cannot do so entirely because the Crown seems to have been anything but

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anxious for a speedy adjudication. This, I should judge, was because use of the vessel was greatly desired. The celerity with which the *Edna* was requisitioned following her capture is indicative of this conclusion. It will be recalled that action looking to such use was all but completed before there was a preliminary hearing on the prize at Port Stanley. The indication is emphasized by the lack of cooperation of the Crown in claimants' effort to bail the vessel during the pendency of the cause in England. It gains positiveness by the reluctance of the Crown to release the vessel after Lord Sterndale delivered judgment that the vessel should be returned to her owners. That was upon April 2, 1919. The British wished the *Edna* to go to France. Consequently, she was not released until May 8, 1919, when the voyage had been completed. Claimants have since then received, however, from the British a sum in excess of $9,000, representing the earnings of that voyage. Upon completion of the voyage to France the vessel was bailed upon a bond of £40,000."

* * * * *

"Claimants, I think, are not entitled to compensation for use of the *Edna* for such period as reasonably was necessary for the Crown to obtain an adjudication upon the charges made against the *Edna*. Neither can they, as heretofore said, rightfully ask compensation for such use over the time that was consumed by their own laches, or such as resulted from their desire to obtain a good price from the British Government. But, making full allowance for these considerations, I think it safe to say, although not with entire accuracy, that the dilatory course pursued by the Crown delayed the prize proceedings for 1 year beyond the date upon which they reasonably should have been brought to finality. Whatever may be the necessities of war, they ought not to be allowed to serve as excuses for beclouding, if not obliterating, the just rights of neutrals."

An Act of Congress approved August 19, 1935 (Private No. 237), appropriated $78,025.83 in settlement of the claim, in accordance with the finding of Judge Knox. The claimants had demanded $670,807.20. Regarding this case as a precedent, I am satisfied that it is properly distinguish-

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able and does not warrant a conclusion that the determination of the British courts upon the question of title in the case under consideration should be administratively examined with a view to determining whether or not the question of law was correctly decided.

In view of the foregoing considerations I am sure that you will agree with me in concluding that the questions which you submitted do not require specific determination.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF STATE.

TITLE INTEREST OF THE UNITED STATES IN THE EX-"U. S. S. MEMPHIS"

It is clear from the facts stated by the Judge Advocate General of the Navy and set forth herein that the United States intended to, and did, transfer to the A. H. Radetsky Iron and Metal Company the full and unconditional title to the ex-*U. S. S. Memphis*, aground on the shores of Santo Domingo, and that the United States has no title to the vessel at this time.

The failure of the Government to comply with statutory requirements relative to public contracts enacted for the sole protection of the Government does not render such contracts void, but only voidable at the Government's option, and only the Government can take advantage of such failure.

DEPARTMENT OF JUSTICE,
October 11, 1935.

SIR: Reference is made to your letter dated August 5, 1935 (received in this Department September 6, 1935), to the Attorney General in which an opinion is requested, at the suggestion of the President, as to whether the United States has any title interest in the ex-*U. S. S. Memphis* now aground on the shores of Santo Domingo.

The following pertinent facts appear from the memorandum of the Judge Advocate General of the Navy accompanying your letter:

The *U. S. S. Memphis* went aground on the shores of Santo Domingo on August 29, 1916. All material of value was removed from the vessel, and she was stricken from the

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Navy Register in accordance with the provisions of the Act of August 5, 1882, 22 Stat. 296 (U. S. C., Title 34, sec. 491). Subsequently the vessel was advertised for sale as provided by the Act of March 3, 1883, 22 Stat. 599 (U. S. C., Title 34, Sec. 492), and in May, 1920, award was duly made to one Courtenai Holland of San Juan, Puerto Rico, at his bid price of $15,000. The purchaser failed to consummate the sale, and consequently the vessel was readvertised. The second purchaser also failed to complete the sale, and upon the third advertisement no bids were received.

The vessel was finally sold, after a fourth advertisement, in January, 1922, to A. H. Radetsky Iron and Metal Company of Denver, Colorado, at its bid price of $3,000. The Company made the necessary deposit at the time of bidding and completed payment of the purchase price in due course. In March, 1922, the Company received from the Government a bill of sale which contained the following provision:

"The A. H. Radetsky Iron and Metal Company * * * having become the legal purchasers of the *U. S. S. Memphis* * * * and having paid the United States the sum of $3,000 therefor, the receipt of which is acknowledged, said vessel is hereby delivered to and declared to be the property of the A. H. Radetsky Iron and Metal Company."

The catalogue issued to prospective bidders provided that vessels must be removed by the purchasers at their expense within thirty days from the date of notice of award and that storage at the rate of $25 a day would be charged for delay in removal subsequent to the thirty-day period, but the bill of sale contained no requirement as to removal. The Government frequently requested the purchaser to remove the vessel but was informed by the purchaser that it was financially unable to do so. In September, 1933, the purchaser offered to relinquish its title to the Government upon refund of the purchase price and payment of interest thereon at 6% from the date of purchase. The following month the Navy Department notified the purchaser that since it had failed to furnish evidence of its ability and intention to remove the wreck without further delay it was considered as abandoned by the purchaser.

Mr. William E. Pulliam, Receiver General of Dominican Customs, has entered into negotiations with the Marran

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Company, New York City, whereby that Company will undertake to dismantle and remove the *Memphis* hulk, and for the right of removal will pay the Dominican Government either a lump sum or a percentage of the amount received from the sale of the scrap removed. The Dominican Government desires assurances that the United States has no title interest in the wreck.

The Act of August 5, 1882, *supra*, provides that the Secretary of the Navy shall cause an examination to be made by a naval board of "all vessels on their return from foreign stations, and all vessels in the United States as often as once in three years, when practicable" and further that if any vessel is found by such board to be unfit for further service the Secretary shall, if he concurs with the opinion of the board, strike the name of such vessel from the Navy Register. The Act of March 3, 1883, *supra*, provides, among other things, that vessels stricken from the Navy Register under the provisions of the said act of August 5, 1882, shall be sold to the person or corporation offering the highest price therefor above the appraised value, and that no vessel shall be sold for less than the appraised value unless the President shall otherwise direct in writing. Although the memorandum of the Judge Advocate General does not so state, I am informally advised by his office that the *Memphis* was not appraised, for the reason that she was a wreck and had no value except as scrap, and I am further advised that the wreck was not regarded as a "vessel", but was considered to be "naval material" and was sold as such under the following provision of the Act of June 30, 1890, 26 Stat. 189, 194 (U. S. C., Title 34, sec. 543), which does not require an appraisement:

"The Secretary of the Navy is hereby authorized to sell, after advertisement of the sale for such time as in his judgment the public interests may require, condemned naval supplies, stores, and materials, either by public auction or by advertisement for sealed proposals for the purchase of the same."

I have considerable doubt as to whether the wreck falls within the category "materials", but my view of the matter is such that this doubt need not be resolved.

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The failure of the Government to comply with statutory requirements relative to public contracts enacted for the sole protection of the Government does not render such contracts void, but only voidable at the Government's option, and only the Government can take advantage of such failure. *United States* v. *N. Y. & Porto Rico S. S. Co.*, 239 U. S. 88; *Ackerlind* v. *United States*, 240 U. S. 531. It is clear that the requirements of the act of March 3, 1883, that vessels stricken from the Navy Register shall be appraised and that such vessel shall not be sold at less than the appraised value unless otherwise directed by the President are for the protection of the United States, and not for the protection of purchasers of the vessels. Even assuming, therefore, that the *Memphis* is a vessel within the meaning of the above-mentioned provisions of the acts of August 5, 1882, and March 3, 1883, the validity of the sale thereof cannot be questioned by the purchasing company. Furthermore, since there has been complete performance of the contract, including payment of the purchase price in full and delivery of the property, it is doubtful whether the Government could now repudiate the sale even if it desired to do so.

For the reasons stated, I concur in the opinion of the Judge Advocate General of the Navy that the United States has no title to the ex-*U. S. S. Memphis* at this time. It is clear from the transactions that took place that the United States intended to, and did, transfer full and unconditional title to the vessel to the A. H. Radetsky Iron and Metal Company.

It is immaterial that the Navy Department notified the Company that it considered the wreck abandoned by it, for it seems plain from the history of the matter that the Company did not abandon the vessel; and even if it had done so, the consummated sale, which included payment of the purchase price and delivery of the vessel, would not have been affected by such action. The fact that the catalogue issued to prospective bidders required the purchasers to remove the vessel within thirty days and to pay storage charges in case of delay in removal is also immaterial. It is obvious that these provisions could not apply to the sale of this particular vessel, for there was no storage of the vessel and consequently no storage charges could have been incurred.

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I express no opinion concerning the respective rights of the Radetsky Iron and Metal Company and the Dominican Government in the vessel at this time, as that question is not involved in the inquiry submitted by you.

It is noted that the President suggests that a copy of this opinion be furnished Mr. Pulliam for the information of the Dominican Government, and I see no reason why that suggestion should not be complied with.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE NAVY.

INSURANCE OF CERTAIN CLASS OF MORTGAGES UNDER THE NATIONAL HOUSING ACT

Mortgages on real estate, with the usual and customary provisions for protecting the proceeds of bonds sold for construction, may lawfully be insured by the Federal Housing Administrator under section 207 of the National Housing Act as amended by the Act of May 28, 1935, prior to completion of the construction projects.

The meaning of the term "project" considered.

DEPARTMENT OF JUSTICE,
October 14, 1935.

SIR: Under date of August 19 you requested my opinion as to "whether the Federal Housing Administrator may validly insure a mortgage upon a low-cost housing project under the provisions of Section 207 of the National Housing Act, as amended, prior to the completion of such project"; and I have now been furnished with a memorandum, prepared in the Federal Housing Administration under date of October 4, 1935, which reads in part as follows:

"The Administrator contemplates the insurance of mortgages under said Section 207 upon the following basis:

"_____ Housing Corporation (hereinafter referred to as the Mortgagor), a corporation organized and existing under and by virtue of the general business corporation law of the State of _____, formed for the purpose of providing housing for persons of low income, limited as to dividends by provisions of its certificate of in-

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corporation, regulated as to rents, charges, capital structure, rate of return, and methods of operation, by the Federal Housing Administrator acting for and on behalf of the United States of America, pursuant to authority granted him by law (hereinafter referred to as the Administrator), in order to secure certain first mortgage bonds in the principal amount of _____ Dollars, ($_____) which said mortgagor proposes to issue, will execute its first trust mortgage to _____ Trust Company, acting for and on behalf of the bondholders as trustee under said trust mortgage (hereinafter referred to, acting in such capacity, as the Mortgagee), covering certain real property, free and clear of all liens and encumbrances except that of the mortgage herein mentioned, held by the mortgagor in fee simple and located in the County of _____ in the State of _____, and certain other property, real and personal, tangible and intangible (including the proceeds from the sale of the bonds aforementioned) held by the mortgagor.

"Upon the execution and delivery of the Trust Mortgage Indenture to the Trustee or Mortgagee and the bonds to the purchaser or purchasers thereof, the proceeds of said bonds will be deposited to the credit of the Mortgagor in a trust account subject to the trusts and uses created in the trust mortgage.

"Upon execution and delivery of the trust mortgage and the bonds secured thereby, and the deposit of the proceeds from the sale thereof, subject to the trust created by the trust mortgage, the Administrator contemplates the insurance of the trust mortgage.

"The mortgagor, in the trust mortgage and by other appropriate instruments, has covenanted to construct a low-cost housing project on the real property hereinbefore mentioned, and has subjected the proceeds from the sale of the bonds to the trust created in the trust mortgage for the purposes stated therein.

"This trust is such that if the mortgagor fully performs its obligation to construct the low-cost housing project in accordance with the approved plans and specifications, using the funds so deposited to defray the cost thereof as advanced, from time to time, upon requisition approved by the Admin-

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istrator and other authorities as the construction progresses, then upon such completion of the project the trust shall terminate. In event the Mortgagor defaults, the trust is such that the surety on the bond for completion shall be entitled to receive the funds in the manner aforementioned from time to time as construction progresses. The trust will also provide that in default of the Mortgagor and the Surety the funds shall be available in the manner provided for completion of the project by the Trustee. The trust will further provide, in substance, that in default of the Mortgagor and the Surety, and upon election by the Mortgagee not to undertake completion on account of the Mortgagor, remaining funds in the trust account shall be applied in reduction of the principal of the indebtedness and the obligation of the Administrator to issue debentures in exchange for the mortgaged property will be limited to the principal sum then remaining due, and the trust will further provide that in such event at the election of the Administrator the claim of the Mortgagee against the Mortgagor against the funds so deposited may be transferred to the Administrator at the time of the conveyance along with other claims of the Mortgagee against the Mortgagor and the balance of the funds so made available to the Administrator for whatever purpose he may choose to use them.

"The facts above outlined, except for the participation of the Administrator as an insuring agency, represent the most common method of financing construction projects, through the medium of a corporate trust mortgage and mortgage bond issue."

Section 207 of the National Housing Act (c. 847, 48 Stat. 1246), as amended by the Act of May 28, 1935 [49 Stat. 293], is copied below:

"The Administrator may also insure first mortgages, other than mortgages defined in section 201 (a) of this title, covering property held by Federal or State instrumentalities, private limited dividend corporations, or municipal corporate instrumentalities of one or more States, formed for the purpose of providing housing for persons of low income which are regulated or restricted by law or by the Administrator as to rents, charges, capital structure, rate of return, or methods of operation. Such mortgages shall contain

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terms, conditions, and provisions satisfactory to the Administrator but need not conform to the eligibility requirements of section 203. Subject to the right of the Administrator to impose a premium charge in excess of, or less than, the amount specified for mortgages defined in section 201 (a), the provisions of sections 204 and 205 shall be applicable to mortgages insured under this section: *Provided*, That the insurance with respect to any low-cost housing property or *project* shall not exceed $10,000,000." [Italics supplied.]

Section 201 (a) defines "mortgage" as "a first mortgage on real estate * * * upon which there is located a dwelling for not more than four families which is used in whole or in part for residential purposes"; and it defines "first mortgage" as meaning "such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby." Section 203 (b) provides, *inter alia*, that a mortgage, in order to be eligible for insurance thereunder, shall "involve a principal obligation * * * in an amount not to exceed $16,000, and not to exceed 80 per centum of the appraised value of the property as of the date the mortgage is executed."

Section 207, however, expressly relates to and authorizes the insurance of "first mortgages other than" mortgages thus defined and restricted; and it contains no definition or clearly stated restriction that the land covered by the mortgage must be improved or occupied at the time the insurance is written. On the other hand, it is provided in the last sentence of the section "that the insurance with respect to any low-cost housing property or *project* shall not exceed $10,000,000."

Standard Dictionary defines "project" as: "Something projected or mapped out in the mind, as a course of action; a scheme; plan; contrivance; as, a useful project." It is also defined in Webster's International Dictionary as: "A plan or design; a plan as devised or proposed; a planned undertaking, etc."

The words "property or", appearing before the word "project", underscored in the proviso to Section 207, as above quoted, did not appear in the statute as originally en-

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acted, and I am told that certain private interests "raised the question as to whether the National Housing Act authorized the Administrator to insure completed projects as well as projects with respect to which the construction had not been initiated." Thereafter Section 207 was amended, adding the additional words "property or." (Sec. 344, Banking Act of 1935, approved August 23, 1935, 49 Stat. 722.) This amendment was reported to the Senate by the Committee on Banking and Currency as a "minor clarifying amendment" (S. Rept. 1007, 74th Cong. 1st Sess.), without more definite explanation, but it is apparent to me that the purpose was to insure that the statutory provision applied to low-cost housing property as well as to low-cost housing projects; and the distinction thus emphasized is of essential bearing upon the question under consideration.

Attributing to the word "project" the significance suggested by the definitions hereinbefore quoted—which definitions were cited and relied upon in my opinion to you of April 25, 1935, in connection with grants of funds for "projects" under the Emergency Relief Appropriation Act of 1935—and considering in connection therewith the other language of Section 207, it must, I think, be concluded that the section does not require that insurance with respect to a low-cost housing project must be deferred until the project is completed; and the legislative history of the measure is not inconsistent with this conclusion (78 Cong. Rec. 11203 *et seq.;* Hearings, Senate Committee on Banking and Currency, p. 56).

Section 207 authorizes the insurance of mortgages only on property "held" by authorized borrowers. While the word "held" frequently has a technical meaning of tenure, i. e. holding of real estate, which would limit mortgages to real estate held by the insured, this construction would make cumbersome, if not impossible, the financing of uncompleted projects. Inasmuch as the amendment previously discussed, by which the word "property" was added to "project", makes almost certain that Congress intended to finance uncompleted projects, its language should be interpreted so as to accomplish the end in the most reasonable manner possible. A mortgage only on the land of the proposed project

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would be of little value in assuring completion. To accomplish this, the proportion furnished by the mortgagor, if any, plus the proceeds of the bonds must necessarily be available for payment of the cost of construction. The word "held" is therefore not to be construed as limited to real estate, but to include, also, the avails of bond sales dedicated to investment in the improvement of the land, under such terms and conditions, contained in the mortgage, as will, in the judgment of the Administrator result in the completion of the project. While the language of the section authorizes insurance of "mortgages—covering property held", an interpretation which would forbid ordinary methods of financing construction and the eventual securing of the bonds by completed real estate projects, is to be avoided.

I therefore conclude that mortgages on real estate, with the usual and customary provisions for protecting the proceeds of bonds sold for construction, may lawfully be insured prior to the completion of the construction projects under Section 207 of the National Housing Act.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the PRESIDENT.

ISSUANCE OF DUPLICATES OF BONDS OF HOME OWNERS' LOAN CORPORATION AND FEDERAL FARM MORTGAGE CORPORATION

The right to establish lost or destroyed bonds is an equitable right not dependent upon express statutory provision.

It is within the implied powers of a corporation to issue duplicates of lost or defaced bonds in proper cases; and the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation may adopt for their bonds the provisions of the Federal statutes and regulations concerning lost, destroyed, or defaced bonds of the United States.

Since the bonds of the said corporations are guaranteed by the United States, there must be a concurrence of action by the corporations and the Secretary of the Treasury in the issuance of duplicate bonds.

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The issuance of duplicates of lost, destroyed, or defaced bonds of the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation by concurrent action of the corporation concerned and the Secretary of the Treasury is authorized in cases coming within the corporate resolutions and also within the scope of sections 3702–3705 R. S., as amended, and the regulations issued thereunder by the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,
October 14, 1935.

SIR: I have your letter of October 4 which reads, in part, as follows:

"The Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation have provided by resolutions of their respective Boards of Directors for the issuance under certain conditions of duplicate bonds in place of bonds lost, stolen or destroyed. As these bonds are fully guaranteed by the United States, and as the Secretary of the Treasury is transfer agent for the corporations, the validity of these resolutions is a matter of concern to the Treasury, and I therefore respectfully request your opinion whether the resolutions in question are valid, either as an exercise of the implied powers of the respective corporations, or as falling within the terms of sections 3702 to 3705 of the Revised Statutes, as amended."

Sections 3702–3705 of the Revised Statutes, as amended (U. S. C., Title 31, Secs. 735–738), authorized the Secretary of the Treasury, under regulations to be prescribed by him, to issue a duplicate of any properly identified, interest-bearing bond of the United States unequivocally established to have been destroyed or so defaced as to impair its value, without bad faith on the part of the owner, and in like manner to issue a duplicate of any duly registered, interest-bearing bond of the United States which "has been lost or destroyed, so that the same is not held by any person as his own property", upon the filing of an indemnity bond in the amount prescribed.

Aside from the question of the right of a citizen to sue the Government—a right usually provided by statute in matters arising out of contract—the establishment of lost or destroyed bonds and recovery thereupon is not dependent

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upon express statutory provision. *Union Bank* v. *New Orleans et al.*, 24 Fed. Cas. pp. 550, 552; *Prescott* v. *Williamsport & N. B. R. Co.*, 159 Fed. 244, 247–248. The principle is indicated by the following excerpts from the last-mentioned case:

"It is well settled that courts of equity have jurisdiction to establish lost instruments * * * and especially have courts of equity jurisdiction in cases of negotiable instruments lost before maturity * * * and upon assuming jurisdiction complete relief will be afforded, even to the extent of authorizing a recovery for principal and interest upon the execution of an indemnity to secure defendant against any future liability * * *. [Citing authorities]

"The objection that neither the bonds nor coupons have ever been produced, and there can be no recovery without their production, cannot be seriously considered, because it might be that they could never be found and no recovery could ever be had. Nothing has been shown in this case to take it out of the general rule of allowing a recovery on lost instruments without their production. The defendant can be properly protected by the entry of an indemnity bond against any future liability."

The Congress has recognized this equitable right and has provided an administrative remedy, making it unnecessary for the bondholders to resort to the courts. Before the remedy was provided the national legislature was frequently called upon to pass special acts authorizing the Treasury to issue duplicates in particular cases. *Farmers' Nat. Bank* v. *Jones*, 105 Fed. 459, 464.

The Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation are corporate instrumentalities of the Federal Government, authorized to issue bonds which are fully and unconditionally guaranteed by the United States, as concluded in the Attorney General's opinion to you of September 14, 1934 (38 Op. 75); and there is no sound reason for believing that their bonds are to be treated differently or that, with respect to such bonds, the old practice of relief by special act, long since abandoned, is to be again invoked. A corporation necessarily has the power to do that which a court of equity would require it to do, and,

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therefore, it must ordinarily be within the implied powers of a corporation to issue duplicates of lost or defaced bonds in proper cases. Considering this, and further considering the policy of the Congress as evidenced by the legislation above mentioned, I cannot doubt that it is within the power of the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation to adopt for their bonds the provisions of the federal statutes and regulations concerning lost, destroyed, or defaced bonds of the United States—in the absence of controlling statutory provisions.

It has been concluded by your General Counsel that Sections 3702–3705 R. S. are applicable by their own force, and this finds support in the Attorney General's opinion of April 9, 1920 (32 Op. 166, 167). It was there concluded that the foregoing sections of the Revised Statutes "were intended to apply to all bonds for the payment of which the United States is responsible", and that, therefore, they were applicable to bonds issued by the corporation of the District of Columbia, for the payment of which "the faith of the United States" had been pledged (16 Op. 173, 175). It is to be pointed out, however, that "the District of Columbia * * * as a corporate legal entity", which had issued the bonds, ceased to exist by operation of the statute which pledged the faith of the United States for their payment.

On the other hand, the corporations here involved are continuing entities and the United States is only secondarily liable for the payment of their obligations. It is only reasonable that such corporations, having originally issued the bonds and remaining primarily liable for their payment, should have some concern in the issuance of duplicates directly affecting their liability; but it is also true that the Unitied States, as the guarantor of their bonds, is likewise concerned. Therefore, if the power to issue duplicate bonds exists—and I think it does—there must be a concurrence of action by the corporations and by the Secretary of the Treasury—the latter acting, not merely as agent for the corporations (under the designations in the resolutions), but also in behalf of the United States as guarantor and exercising the power and discretion vested in him by the statutes concerning duplication of government obligations.

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It is, therefore, my opinion that the issuance of duplicates of lost, destroyed or defaced bonds of the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation by concurrent action of the corporation involved and of the Secretary of the Treasury, as hereinbefore indicated, is authorized in cases coming within the corporate resolutions and also within the scope of Sections 3702–3705 R. S., as amended, and the regulations issued thereunder by the Secretary of the Treasury. The resolutions refer, somewhat incidentally, to stolen bonds, not expressly covered by the statute, but I think it may reasonably be assumed their language indicates a purpose to provide for stolen bonds only in such cases and under such circumstances as would come within the statute as it has been, or may hereafter be, authoritatively construed.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

SUFFICIENCY OF NEVADA STATUTE CEDING JURISDICTION OVER FEDERAL BUILDING SITE AT ELY, NEVADA

The Act of March 28, 1935, of the legislature of the State of Nevada, ceding jurisdiction to the United States over land purchased by it in Nevada, is insufficient to meet the requirements of section 355 of the Revised Statutes respecting expenditure of public money thereon, the jurisdiction ceded not being exclusive because expressly conditioned on reservations imposing State taxation, labor safety, and health laws.

The United States holds as an ordinary purchaser land acquired without consent or cession of jurisdiction by the State wherein it is situate and it is subject to the legislative authority of such State unless used as a means to carry out the purposes of the Federal Government.

To transfer the exclusive political jurisdiction and dominion contemplated by article I, section 8, clause 17 of the Constitution over land acquired by the Federal Government, the State in which it is situate must either consent to the acquisition or legislatively cede such jurisdiction.

Acceptance by the Federal Government of cession of political jurisdiction and dominion over land situate in a State, in the absence of dissent, is presumed from the benefit conferred.

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The "consent" of the State required by Section 355 of the Revised Statutes of the United States before expenditure of public money is that contemplated by article I, section 8, clause 17 of the Constitution, and where expressed by legislative cession of jurisdiction must be free from qualifications, conditions, or reservations inconsistent with the exercise by the Congress of exclusive legislation over the place ceded.

When a State expressly cedes jurisdiction over the land to the United States, it may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition, and the terms of the cession, to the extent that they may lawfully be prescribed, determine the extent of the Federal jurisdiction.

There is nothing incompatible with the exclusive jurisdiction contemplated by article I, section 8, clause 17 of the Constitution in the reservation by a State of the right to serve its processes on land in it owned by the Federal Government.

While State laws regulating private civil rights may continue in force, consistently with exclusive Federal jurisdiction, as laws of the United States on lands ceded to it by State consent so far as not in conflict with Federal laws and the purposes of the acquisition, express reservation in the State act of cession of jurisdiction, present and future, over specified subjects is inconsistent with exclusive Federal jurisdiction.

DEPARTMENT OF JUSTICE,
October 18, 1935.

SIR: I have the honor to refer to your letter of June 27, submitting a copy of an Act of March 28, 1935, of the Legislature of Nevada, entitled "An Act ceding to the Federal Government jurisdiction over the land and within the premises of a federal building to be erected at Ely, Nevada", and requesting my opinion as to the sufficiency of the cession to meet the requirements of Section 355 of the Revised Statutes (U. S. C., Title 40, Sec. 255), in view of certain reservations incorporated in the State statute, the pertinent part of which reads as follows:

"Section 1. The State of Nevada, *except as hereinafter reserved and provided*, hereby cedes jurisdiction to the United States upon the land and within the premises of a federal building to be erected by the said United States at Ely, Nevada. Such land situated in White Pine County, Nevada, and described as follows, to-wit lots 7, 8, 9, 10, and 11, block Y, city of Ely, county of White Pine, State of Nevada, as the same appears of record upon the official plat

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of said city of Ely on file in the office of the county recorder of White Pine County, Nevada.

"Section 2. In the erection of such federal building by contract or otherwise, or in case of any subsequent reconstruction or alteration of such building, *it is hereby reserved and provided that the state labor laws, the state labor safety laws and the state health laws, shall apply* to all persons, firms, associations or corporations having contracts for such construction or reconstruction as to all provisions contained therein, and no contractor having any such contract *shall have the right to claim to be or to declare himself to be a government instrumentality.*

"Section 3. It is further reserved and provided that *any private property* thereon or therein *shall be subject to taxation by the state or any subdivision thereof* having the right to levy and collect such taxes, but any property upon or within such premises *which belongs* to the government of the United States shall be free of taxation by the state, by the county of White Pine, or the city of Ely.

"Section 4. This state reserves the right to serve or cause to be served, by any of its proper officers, any criminal or civil process upon such land or within such premises for any cause there or elsewhere in the state arising, where such cause comes properly under the jurisdiction of the laws of this state or any subdivision thereof." [Italics supplied.]

Your request for an opinion involves no question respecting the title of the United States to the land under consideration, and it may be noted that title to it was approved in my opinion addressed to you under date of May 17, 1933. Title to the land comprising the site was conveyed to the United States by several persons in 1932 and 1933, so that it appears that it was "purchased" by the United States within the language of Article I, section 8, clause 17 of the Constitution of the United States, but not "by the consent of the legislature of the State" of Nevada within that clause. The subsequent State statute of March 28, 1935, quoted above, therefore must be looked to for such cession of jurisdiction as has been made by the State Legislature.

Since the land was originally acquired without consent or cession of any jurisdiction by the Legislature of the State of Nevada. the United States prior to the effective date of the

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above Nevada statute of March 28, 1935, held it as an ordinary proprietor and during that time "unless used as a means to carry out the purposes of the government" it was "subject to the legislative authority and control of that state equally with the property of private individuals," *Ft. Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, 531; *Williams* v. *Arlington Hotel Co.*, 22 Fed. (2) 669; *U. S.* v. *San Francisco Bridge Co.*, 88 Fed. 891; *U. S.* v. *Penn.*, 48 Fed. 669; *U. S.* v. *Cornell*, 25 Fed. Cas. Nos. 14867, 14868; 14 Op. 557; 13 id. 131; 10 id. 34. As the Court said in *Ft. Leavenworth R. R. Co.* v. *Lowe*, *supra:*

"The consent of the States to the purchase of lands within them for the special purposes named is, however, essential under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion" (p. 531).

Had the state at the time of the purchase of the land by the United States consented to the purchase, such consent *ipso facto* would have operated to vest in the United States, with the title, that exclusive political jurisdiction and dominion contemplated by Article I, Section 8, Clause 17 of the Constitution:

"The Congress shall have power * * * to exercise *exclusive legislation* in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become a seat of the government of the United States, *and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection* of forts, magazines, arsenals, dock-yards, *and other needful buildings.*" [Italics supplied.]

U. S. v. *Unzeuta*, 281 U. S. 138, 143; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 652; *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439, 449; *Benson* v. *United States*, 146 U. S. 325; *Ft. Leavenworth R. R. Co.* v. *Lowe*, *supra; Chicago, Rock Island & Pacific Ry. Co.* v. *McGlinn*, 114 U. S. 542; *Steele* v. *Halligan*, 229 Fed. 1011; *U. S.* v. *Holt*, 168 Fed. 141; *U. S.* v. *Tucker*, 122 Fed. 518; *In re Ladd*, 74 Fed. 31; *U. S.* v. *Cornell*, *supra;* 31 Op. 260, 263, 265, 282, 294; 24 id. 617; 15 id. 212, 480; 13 id. 460; 10 id. 34; 9 id. 129, 263; 8 id. 418; 7 id. 628.

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If the Nevada Act of March 28, 1935, unqualifiedly ceded exclusive jurisdiction to the United States over the land theretofore purchased, the United States thereby became vested with the same exclusive political jurisdiction and dominion as if the land had been acquired originally with the consent of the legislature of the State; for "legislative cession of jurisdiction after purchase has the same effect as if made before purchase." *Steele* v. *Halligan*, *supra*, 1016; *U. S.* v. *Tucker*, *supra; Ft. Leavenworth R. R. Co.* v. *Lowe*, *supra;* 7 Op. 628.

"Such cession may take place in two ways: indirectly, by an act of the State legislature consenting to the *purchase* of the land by the United States; and directly, by an act of the State legislature granting the jurisdiction to the United States." 13 Op. 460.

Even though the United States makes no application to the state for the act of cession, as is said in *Ft. Leavenworth R. R. Co.* v. *Lowe*, *supra*, "as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part" (p. 528). *Benson* v. *U. S.*, *supra*, 330.

Where, however, a state does not originally consent to the purchase of land within it by the United States, but later cedes jurisdiction over it to the United States, the state may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition; and the terms of the cession, to the extent that they may lawfully be prescribed, determine the extent of the Federal jurisdiction, because all that can be accepted by the United States is what is offered by the state. If limited jurisdiction is offered, only limited jurisdiction can be accepted. *U. S.* v. *Unzeuta*, *supra*, 142; *Arlington Hotel Co.* v. *Fant*, *supra*, 451; *Palmer* v. *Barrett*, 162 U. S. 399, 403; *Benson* v. *U. S.*, *supra*, 330; *Chicago, Rock Island & Pacific Ry. Co.* v. *McGlinn*, *supra; Ft. Leavenworth R. R. Co.* v. *Lowe*, *supra.* Section 355 of the Revised Statutes of the United States, with the requirements of which you are concerned, provides in part as follows:

"*No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon* any armory, arsenal, fort, fortification,

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navy-yard, custom-house, light house, *or other public building, of any kind whatever*, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, *nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given.*" [Italics supplied.]

The cession contemplated by Section 355, before any public money can be expended upon the land under consideration for the purpose of erecting thereon the proposed public building, is of that *exclusive* jurisdiction "which, according to the letter and the intent of the Constitution (Article I, Sec. 8, Cl. 17) are in such cases to be vested in the United States." 8 Op. 102, 418. See also *Ft. Leavenworth R. R. Co.* v. *Lowe*, *supra*, 530; 7 Op. 628; 10 id. 34; 15 id. 212; 24 id. 617; 31 id. 260, 263, 265, 282, 294; 3 Dec. Comp. Treas. 530.

"It has been settled that the 'consent' required by Section 355 is that contemplated and spoken of in Article I, section 8, paragraph 17 of the Constitution (24 Op. 619); that it must be free from qualifications, conditions, or reservations inconsistent with the exercise by the Congress of 'exclusive legislation' over the place ceded." 31 Op. 260, 261.

Under this relation of the requirements of Section 355 of the Revised Statutes to Article I, Sec. 8, Cl. 17 of the Constitution, the question is whether the above Act of March 28, 1935, of the Legislature of Nevada cedes to the United States exclusive jurisdiction over the premises under consideration. Unless the express reservations and provisos in the Nevada Statute are compatible with the exclusive jurisdiction contemplated by Section 355 of the Revised Statutes, or unless no effect is to be given to such reservations and provisos, obviously it does not cede exclusive jurisdiction to the United States; for the Nevada Statute only "except as hereinafter reserved and provided, hereby cedes jurisdiction to the United States upon the land." Were the Nevada statute susceptible of the construction that it first unequivocally expresses the consent of the State Legislature to cession of exclusive jurisdiction, and then, not by way of an absolute and inseparable express condition to such consent, but by separate, separable provisions, seeks to curtail the jurisdiction so ceded, the question would be pre-

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sented as to whether the cession might operate free from the objectionable reservations. 10 Op. 34; 24 Op. 617. But the express language in Section 1 of the Nevada statute, "except as hereinafter reserved and provided, cedes jurisdiction to the United States", when coupled with the express reservations and provisos in Sections 2 and 3, is plainly not susceptible of such construction. The words "except as hereinafter reserved", indicate the clear legislative intent initially to grant something less than exclusive jurisdiction—to withhold certain jurisdiction—and the words "except as hereinafter provided" indicate plainly the intent to make the reservation of certain jurisdiction an express condition of the consent. The very first clause of the statute contains the reservation and proviso, before any cession is made, and the subsequent words of Section 2, "reserved and provided", relate back to the first clause. Hence the situation does not fall within 10 Op. 34, or 24 Op. 617, or 31 id. 260, but within the above distinction which is expressly noted in 24 Op. 617, and within the opinions in 8 Op. 30, 102, 418; 20 id. 298, 611:

"But there is, I think, a clear distinction between acts of the character passed upon by Mr. Cushing and Mr. Olney (8 Op. 102, 418; 20 id 611), in which the reservation of jurisdiction is made an express condition of the consent, and an act which unequivocally expresses the consent of the legislature and does not make any objectionable reservation which may contain an absolute and inseparable condition of the consent. In such a case there seems to be no good reason for holding that the reservation invalidates the entire act." (24 Op. 620.)

It is, therefore, necessary to examine the reservations and provisos in the State Statute and determine whether they are compatible with the exclusive jurisdiction contemplated by Section 355 of the Revised Statutes, or, if not, whether any effect is to be given to them.

Section 4 of the Nevada Statute, reserving to that State the right to serve its processes upon the land described in the Act, does not qualify any otherwise exclusive jurisdiction ceded by it, for the reason that "there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another state in such cases to execute

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its process within its limits." *Ft. Leavenworth R. R. Co.* v. *Lowe*, *supra*, 533, 534; *Ohio River Contract Co.* v. *Gordon*, 244 U. S. 68; *Steele* v. *Halligan*, *supra; U. S.* v. *Holt*, *supra*, 146, 147; *In re Ladd*, *supra; U. S.* v. *Davis*, 25 Fed. Cas. No. 14930; *U. S.* v. *Cornell*, *supra;* 31 Op. 265; 24 id. 617; 9 id. 130, 263; 8 id. 387, 418; 7 id. 628.

Section 2 of the Nevada Statute, however, clearly is incompatible with the exclusive jurisdiction contemplated by Section 355 of the Revised Statutes. It imposes upon any construction, reconstruction, or alteration of the proposed federal building on the premises the state labor, labor safety and health laws, going so far as expressly to provide that no contractor having a contract for any such operations "shall have the right to claim to be or declare himself to be a government instrumentality." These reservations preclude the United States from exclusive jurisdiction for the reason that Congress has prescribed, and obviously must retain the power to prescribe, the terms and conditions under which labor shall be performed in the construction of public works of the United States, even on lands over which a state retains exclusive political jurisdiction and in which the United States has only a proprietory interest. *U. S.* v. *San Francisco Bridge Co.*, *supra.*

Section 3 subjects to taxation, not only by the state but by any subdivision thereof, any private property on or in the premises, expressly exempting only property "which *belongs* to the Government of the United States." This language may be sufficiently broad to subject to possible local taxation private property not belonging to the United States but in the custody of its postal authorities, remote though that contingency may be. Assuming, however, that such reservation may not be calculated to interfere with the Governmental postal functions for which the land is intended to be used, it is nevertheless doubtful whether reservation by the state of the right to tax private property on land over which state jurisdiction is ceded is not inconsistent with the exclusive jurisdiction in the United States contemplated by Section 355 of the Revised Statutes. *U. S.* v. *Unzeuta*, *supra; Surplus Trading Co.* v. *Cook*, *supra; Ft. Leavenworth R. R. Co.* v. *Lowe*, *supra; Williams* v. *Arlington Hotel Co.*, *supra;* 8 Op. 388; 38 id. 216.

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The express reservations in Section 2, and possibly those in Section 3, therefore, withholding substantial jurisdiction from the United States, being incompatible with exclusive jurisdiction, the cession of jurisdiction by the state to the United States is insufficient to meet the requirements of Section 355. 31 Op. 260, 263, 265, 282, 294; 20 id. 242, 298, 611; 13 id. 460; 8 id. 30, 102, 418.

It is to be observed that there is nothing in what has been said concerning Sections 2 and 3 of the Nevada Statute inconsistent with the doctrine that state laws regulating private civil rights (as distinguished from state criminal laws, *In re Ladd*, *supra*, 40, 41; *Steele* v. *Halligan*, *supra*, 1017) continue in force, as laws of the United States, on lands ceded by consent of the state to the United States, if not in conflict with the laws of the new sovereignty or the purpose for which the land is acquired, until superseded by laws enacted by the United States. *Downes* v. *Bidwell*, 182 U. S. 244, 298, 345; *Chicago, Rock Island & Pacific Ry. Co.* v. *McGlinn*, *supra; Danielson* v. *Donmopray*, 57 Fed. (2) 565; *Williams* v. *Arlington Hotel Co.*, *supra; Steele* v. *Halligan*, *supra.* The difficulty with Sections 2 and 3 of the Nevada Act is that they do not merely occupy a vacant field until filled by the Federal Government—they withhold and reserve jurisdiction, present and future, over the matters specified in them, howsoever inconsistent with existing or future laws of the United States. That precludes exclusive jurisdiction from vesting in the United States. Where there is a purchase of land by the United States with the consent of the state legislature, exclusive jurisdiction attaches by virtue of the constitutional provision itself; but in the case of cession by the state, by express legislative enactment for the purpose, of jurisdiction over land theretofore purchased by the United States without the state's consent, the jurisdiction of the United States over the place is determined from such legislative act, as heretofore noted. If the state act of cession withholds essential jurisdiction, obviously the United States does not acquire exclusive jurisdiction, as the extent of the jurisdiction acquired depends upon the terms of the cession which the Government is presumed to accept—and the reservations are a part of what is so accepted.

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It is to be further observed that while the Act of the Nevada Legislature may be effective to vest a qualified or limited jurisdiction in the United States (*Ft. Leavenworth R. R. Co.* v. *Lowe, etc. supra*), that consideration is irrelevant to the question here presented; because, unless it confers the requisite exclusive jurisdiction, Section 355 of the Revised Statutes forbids expenditure of public money on the premises for the proposed building. For the same reason, the consideration that the land and any buildings which in fact might be erected thereon for the use of the National Government might be free from any such interference and jurisdiction of the state as would impair their effective use for purposes for which the property was acquired (*U. S.* v. *Unzeuta, supra*) also is irrelevant; because the jurisdiction so obtained is nevertheless not initially exclusive within the requirements of Section 355 of the Revised Statutes as related to Article I, Section 8, Clause 17 of the Constitution.

For these reasons it is my opinion that the cession of jurisdiction to the United States by the above Act of March 28, 1935, of the Legislature of Nevada is not sufficient to meet the requirements of Section 355 of the Revised Statutes of the United States. It is, therefore, suggested, as was done by Attorney General Gregory in his opinion in 31 Op. 263, that an effort be made to secure passage by the Legislature of the State of Nevada of an act of cession which will be free from any reservations, qualifications, or conditions inconsistent with the exercise by the United States of the exclusive jurisdiction contemplated in Section 355.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

INCLUSION OF CERTAIN LANDS IN GRAZING DISTRICTS WITHOUT RESTRICTION AS TO ACREAGE, UNDER THE TAYLOR GRAZING ACT

The Taylor Grazing Act (48 Stat. 1269) is ambiguous as to the scope of the acreage limitation imposed upon the creation of grazing districts therein provided for, and the legislative history of the Act must be considered in determining the meaning of such limitation.

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The Act does not authorize the inclusion in grazing districts of more than 80,000,000 acres of the lands withdrawn by Executive Order No. 6910 of November 26, 1934.

DEPARTMENT OF JUSTICE,
October 19, 1935.

SIR: Reference is made to the letter of the Acting Secretary of the Interior of September 6, 1935, to the Attorney General, in which attention is called to certain provisions of the Taylor Grazing Act authorizing the Secretary of the Interior to establish, under certain conditions, grazing districts on lands of the public domain, and in which an opinion is requested as to whether public lands withdrawn and reserved by Executive Order No. 6910 of November 26, 1934, may be included in such grazing districts without restriction as to acreage.

The pertinent part of the Taylor Grazing Act, approved June 28, 1934 (48 Stat. 1269), is contained in section 1 and reads as follows:

"That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of eighty million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof."

Executive Order No. 6910, issued by the President some five months subsequent to the approval of the Act, temporarily withdraws from settlement "all of the vacant, unreserved and unappropriated public land" in twelve states—Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah,

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and Wyoming—and reserves it "for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of the said act of June 28, 1934 [Taylor Grazing Act] and for conservation and development of natural resources."

In view of the reference in the opinion of the Acting Solicitor of the Department of the Interior, a copy of which you enclosed with your letter, to the legislative history of the Taylor Grazing Act, I have given that history careful consideration. It seems to me clear from that history that it was the intention of the Congress that not more than 80,000,000 acres of the lands which were vacant, unappropriated, and unreserved at the time the Act became effective should be included in the grazing districts authorized by the Act.

In examining the legislative history of the Act it is important to bear in mind that at the time the bill was before the Congress Executive Order No. 6910 had not been issued. Consequently, there were at that time in the states now covered by Executive Order No. 6910 approximately 173,000,000 acres of vacant, unappropriated, and unreserved public lands available for the creation of grazing districts, all of which 173,000,000 acres are now reserved by said Executive Order. It is also important to bear in mind that this 173,000,000 acres constituted practically all of the vacant, unappropriated, and unreserved public lands suitable for grazing purposes.

The original bill (H. R. 6462, 73d Congress, 2d Sess.) as passed by the House of Representatives did not contain the provision "not exceeding in the aggregate an area of 80,000,000 acres of vacant, unappropriated, and unreserved lands." It simply authorized the Secretary of the Interior to establish grazing districts or additions thereto *from any part of the public lands* of the United States, no reference whatever being made either to reserved or to unreserved lands.

The limitation as to acreage was inserted by the Senate as an amendment to the House bill. That part of the report on the bill by the Senate Committee on Public Lands and Surveys (Report No. 1182, 73d Cong., 2d Sess.) entitled "Scope of the Legislation" is the same as the corresponding

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part of the report of the House Committee on Public Lands (No. 903), except for the third paragraph thereof. That paragraph in the House Report reads: "The bill would authorize the creation of grazing districts out of the public domain, to be administered by the Department of the Interior in cooperation with local associations of stockmen interested in the use of such grazing districts." The first sentence of the corresponding paragraph in the Senate Report is the same. However, there is added to that sentence in the Senate Report the following sentence: "The total area of such grazing districts shall not exceed an aggregate of 80,000,000 acres."

The following explanation of the amendment was given on the floor of the Senate by Senators Adams and O'Mahoney of the Committee on Public Lands and Surveys (Cong. Rec., Vol. 78, Pt. 10, 73d Cong., 2d Sess., p. 11139):

"Mr. ADAMS. * * *

"The bill does not authorize the creation of grazing districts comprising the entire 173,000,000 acres, but has been limited to 80,000,000 acres. There was some question as to whether or not all this land should be included; consequently the committee has modified the House bill by restricting the authority of the Secretary of the Interior so that he may create grazing districts out of but 80,000,000 acres.

* * * * *

"Mr. BORAH. May I ask the Senator why the limitation was made? In other words, out of the entire 173,000,000 acres, I understand the bill operates only on 80,000,000?

"Mr. ADAMS. That is correct.

"Mr. BORAH. Is the Secretary of the Interior to determine for himself in what particular portion of the 173,000,000 acres he will select the 80,000,000 acres?

"Mr. ADAMS. That is true. It was the idea to have compact grazing areas, and, perhaps, leaving out the fragmentary areas which were not suitable for compact grazing districts.

"Mr. BORAH. Then it gives the Secretary of the Interior complete power to determine for himself on what portion of the 173,000,000 acres he will operate?

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"Mr. ADAMS. Yes; the original bill gave him the power to act with respect to the entire 173,000,000 acres, but the bill now pending really restricts his power rather than enlarges it.

"Mr. BORAH. Yes; if he is to have the authority to deal with a portion of the land, why is it not wise to give him authority over the entire acreage?

"Mr. ADAMS. I will be quite frank in saying to the Senator that my own judgment is that it would be preferable to have the entire area of public lands subject to that jurisdiction, but the committee seemed to feel it was preferable to provide a limitation. That action was agreeable to the Secretary of the Interior, who stated, through his representatives, that their survey indicated that only approximately 50,000,000 acres were so located as to be available for the creation of such grazing districts.

* * * * *

"Mr. O'MAHONEY. I may say to the Senator from Idaho, in answer to his question, that the amendment limiting the operation of the bill to 80,000,000 acres was the result of a belief upon the part of a great many of us in the public-land States that it would be unwise to clothe the Secretary of the Interior with the power to shut off all homesteading in the public-land States.

"If the Secretary were permitted to create grazing districts without limitation it would have been possible for him to have stopped all homesteading. It was testified before the Committee on Public Lands and Surveys that the present prospects are, however, that only about 50,000,000 acres would be needed for districts which are contemplated. Consequently it was felt that a degree of assurance might be conveyed to those who still believe that opportunity for homesteading upon the public domain should be maintained, by inserting the amendment, which has the effect of saying to the Secretary, and to all who are interested in the development of the public domain, that only 80,000,000 acres will be affected by the bill without act of Congress. This gives us the assurance that all the public-land laws will continue to apply upon the area which is not included in the grazing districts."

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Later a bill (H. R. 3019) amending certain sections of the Act, was passed by both Houses of the 74th Congress but was vetoed by the President. It amended that part of section 1 under consideration by changing the words "eighty million" to "one hundred forty-two million." (See Report of the Senate Committee on Public Lands and Surveys, Report No. 1005, 74th Cong., 1st Sess.) At the time that this amending bill was before the Congress, Executive Order No. 6910 had been issued and was in force.

To hold that the limitation in section 1 of the Taylor Grazing Act does not apply to lands reserved by Executive Order No. 6910 would seem to lead to an unreasonable result. As already stated, and as shown by the above-mentioned Committee Reports, at the time the Taylor Grazing Act was passed practically all of the then vacant, unappropriated, and unreserved public land suitable for grazing, consisting of approximately 173,000,000 acres was situated in those states now covered by Executive Order No. 6910. The effect of the Executive Order was, therefore, to withdraw and reserve practically all of the public lands suitable for grazing that were unreserved at the time the Act was passed. If the land so withdrawn could be included in grazing districts without restriction as to acreage, practically the whole of the public land unreserved at the time the Act was passed could be so included. Moreover, if the lands withdrawn by Executive Order No. 6910 could be included without restriction as to acreage, it would follow that land withdrawn under any other order, issued after the Act became effective, could be so included. Hence, practically all public lands of the United States, chiefly suitable for grazing and raising forage crops, could be included in the grazing districts authorized by the Act, as reserved lands. Under such circumstances, the grazing districts might include practically all public lands suitable for grazing purposes and still consist almost wholly of reserved lands—a situation certainly not contemplated by the statute.

It thus appears that if the statute be interpreted to mean that the acreage limitation applies only to lands now vacant, unappropriated, and unreserved, and is not applicable to lands withdrawn by the Executive Order in question, the

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limitation is in fact destroyed. Such an interpretation is contrary to the principle that a statute must be so construed as to give effect to every part of it, if possible.

The statute, at best, is so ambiguous in the respects noted that it cannot be satisfactorily determined from its language alone whether the express limitation of 80,000,000 acres is intended to include or exclude lands unreserved when it became effective, and only thereafter reserved. On that account, and because of the unreasonable result which would follow from a holding that the limitation does not apply to lands reserved by Executive Order No. 6910, and because of the necessity of so construing the statute as to give effect to every part, the legislative history of the Act must be considered in determining its meaning.

For the foregoing reasons, it is my opinion that the Taylor Grazing Act does not authorize the inclusion in grazing districts of more than 80,000,000 acres of the lands withdrawn by Executive Order No. 6910 of November 26, 1934.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE INTERIOR.

VALIDITY OF PROPOSED EXECUTIVE ORDER EFFECTING AN INTERCHANGE OF PROPERTY BETWEEN THE WAR AND NAVY DEPARTMENTS—RECONSIDERATION OF OPINION OF SEPTEMBER 26, 1935

Repeal by implication is not favored, and only in case the two statutes involved are in direct conflict or clearly inconsistent with each other will a repeal be implied.

The provisions of the Act of July 11, 1919, 41 Stat. 131, 132, authorizing the interchange of property between the Army and Navy, are not impliedly repealed, either partially or otherwise, by the Act of March 12, 1926, providing a method for the disposition of real property no longer needed for military purposes.

Opinion to the President of September 26, 1935, holding that a proposed Executive order effecting a certain interchange of property between the War and Navy Departments was authorized under the Act of July 11, 1919, *supra*, adhered to on reconsideration.

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DEPARTMENT OF JUSTICE,
October 19, 1935.

SIR: In compliance with your radiographic request of October 8, 1935, I have given further consideration to my opinion to you of September 26, 1935, in which I approved as to form and legality a proposed executive order making an interchange of property between the War and Navy Departments. In this reconsideration I have conferred with representatives of the two Departments concerned.

The proposed order was accompanied by a joint letter of the Acting Secretary of War and the Acting Secretary of the Navy addressed to you, in which the interchange of the property referred to in the order was agreed to by the heads of both Departments. In my letter of September 26, 1935, I stated that in view of this agreement I was of the opinion the proposed order was authorized by the following provisions of the Act of July 11, 1919, 41 Stat. 131, 132:

"The interchange without compensation therefore, of military stores, supplies, and equipment of every character, including real estate owned by the Government, is hereby authorized between the Army and the Navy upon the request of the head of one service and with the approval of the head of the other service."

The word "military" in the Act obviously refers to both Army and Navy property. (Cf. the Century Dictionary and Cyclopedia, ol. VI, p. 3761.)

It has been suggested by the Judge Advocate General of the Army that the Act of March 12, 1926 [44 Stat. 203], and particularly section 11 of that Act, repealed the above-quoted provisions of the said Act of July 11, 1919, insofar as they relate to lands in military reservations. It is not suggested that these provisions have been repealed in any other respect.

The Act of March 12, 1926, contains no reference to the Act of July 11, 1919. Any repeal or partial repeal, therefore, of the prior Act would be by implication only. The courts, however, do not favor repeal by implication, and it is well settled that it is only where the two statutes involved are in direct conflict or are clearly inconsistent with each other that a repeal will be implied.

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An examination of the Act of March 12, 1926, shows that the purpose of that act was to provide a method for the disposition of certain specifically designated tracts or parcels of land upon the determination by the Secretary of War that they were no longer needed for military purposes. Section 11 of the Act, chiefly relied on to show repeal by implication, is as follows:

"Hereafter if any real property acquired for military purposes becomes useless for such purposes, the Secretary of War is directed to report such fact to Congress in order that authorization for its disposition in accordance with this Act may be granted" [44 Stat. 207].

It will be noted that the above-quoted section refers to property which has become useless for military purposes. It is my understanding that the property covered by the proposed executive order has not become useless for such purposes. It will also be noted that the section relates only to the "disposition" of property, and makes no reference to "interchanges" between the two Departments.

Construing other Acts relating to the disposition of abandoned or useless property, the Attorney General has held that disposition means the alienation or effectual transfer of the title to the property (34 Op. 320, 322).

The Act of July 11, 1919, however, does not seem to contemplate any such disposition of abandoned or useless property. That act, it seems to me, insofar as it relates to military reservations, applies to property still used and useful for military purposes but which in the opinion of the executive branch of the Government can in the interest of the national defense be more advantageously used by the Navy Department. In such a situation the property is not to be disposed of and the title of the Government thereto divested, but provision is made whereby, upon agreement between the heads of the War and the Navy Departments, the use of and jurisdiction over the property may be given to the Navy Department.

Since the purposes of the two Acts are entirely different and since they relate to entirely different classes of property, they are not, in my opinion, inconsistent or in conflict with each other, and there is no reason why they may not stand

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together. Consequently, it is my view that there is no implied repeal, either partial or otherwise, of the prior act by the latter.

I see no reason, therefore, to change my opinion as expressed in my letter to you of September 26, 1935 (38 Op. 293.) As stated in that letter, I am of the opinion that, the contemplated interchange of property having been agreed to by the heads of both the War Department and the Navy Department, the proposed order is authorized under the provisions of the Act of July 11, 1919.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the PRESIDENT.

QUESTIONS ARISING IN THE NATIONAL ARCHIVES ESTABLISHMENT UNDER THE FEDERAL REGISTER ACT

1. Documents required or authorized to be published under section 5 of the Federal Register Act are, with the exceptions noted, valid and operate as constructive notice to the persons designated as soon as they are filed with the Division of the Federal Register and made available for public inspection as provided in section 2 of the Act; and publication in the Federal Register is not essential to the validity of such documents.
2. The provisions of section 7 of the Act respecting validity and constructive notice do not apply to the compilation of documents referred to in section 11.

DEPARTMENT OF JUSTICE,
October 21, 1935.

SIR: Referring to the letter of your Assistant Secretary, Mr. Marvin H. McIntyre, dated October 14, 1935, I have the honor to state my opinion upon the following questions arising in the National Archives Establishment in connection with the administration of the Federal Register Act (Public No. 220, 74th Congress [49 Stat. 500]) and submitted in the Archivist's letter to you of October 10, 1935:

1. Is it necessary that documents required or authorized to be published under section 5 be both filed with the Division and published in the Federal Register in order for such documents to be valid or to serve as constructive notice under the provisions of section 7?

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2. If both filing and publication are held to be necessary, will the validity or constructive notice of such documents date from the time of filing with the Division or from the time of publication in the Federal Register?

3. Do the provisions of section 7 apply to the compilation referred to in section 11 and do such provisions affect the validity and constructive notice of documents already issued which may or may not be included in the compilation?

Section 5 (a) of the Federal Register Act designates certain documents which are *required* by the Act to be published in the Federal Register. Section 5 (b) designates other documents which *may* be published in the Federal Register.

Section 2 provides that the original and two duplicate originals or certified copies of all documents required or authorized to be published under section 5 shall be filed with the Division of the Federal Register in the National Archives Establishment, and that thereupon the Director of the Division shall cause the day and hour of the filing to be noted on the originals and the copies. That section also provides that upon such filing of any such document the Director shall immediately make a copy thereof available for public inspection in the office of the Director and shall also immediately transmit a copy thereof to the Government Printing Office for printing in the Federal Register.

Section 3 requires the Government Printing Office to print all such documents in the Federal Register and to forthwith distribute them as specified in the Act.

Section 11 provides that within six months after the approval of the Act each agency of the Government shall prepare and file with the Committee created by the Act a complete compilation of all documents issued or promulgated prior to the date documents are required or authorized by the Act to be published in the Federal Register and which are still in force and effect and relied upon by the agency as authority for, or invoked by it in the discharge of, any of its functions and duties. That section further provides that the Committee shall make report concerning such compilation to the President, who shall determine which of such documents have general applicability and legal effect and

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shall authorize the publication of such documents in a special or supplemental edition of the Federal Register.

Section 7 of the Act is as follows:

"No document required under section 5 (a) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 2; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this Act and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number."

In view of these provisions it seems to be clear that documents required or authorized to be published under section 5 of the Act are, with the exceptions noted, valid and operate as constructive notice to the persons designated as soon as they have been filed with the Division and made available for public inspection in the manner provided in section 2 of the Act; and that publication in the Federal Register is not essential to their validity. It seems to be equally clear that the provisions of section 7 respecting validity and constructive notice do not apply to the compilations of documents referred to in section 11. The former section, insofar as it relates to documents described in the latter section, merely provides that the publication of such documents shall

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create certain rebuttable presumptions and that the published contents of such documents shall be subject to judicial notice.

I am of the opinion, therefore, that the first and third questions presented by the Archivist should be answered in the negative. Because of the negative answer to the first question, no answer to the second is required.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

THOMAS JEFFERSON TERRITORIAL EXPANSION MEMORIAL

A proposed Executive order approving the establishment and authorizing the construction of the Thomas Jefferson Territorial Expansion Memorial, in accordance with the plans and specifications of the United States Territorial Expansion Commission at an estimated cost of $30,000,000, recites: That the United States Territorial Expansion Memorial Commission created pursuant to public resolution approved June 15, 1934, recommended in its report of May 1, 1935, the establishment and construction of a permanent memorial, on the site and in accordance with the plans given in the report, at an estimated total cost of $30,000,000; that the city of St. Louis, Missouri, has agreed to contribute the sum of $7,500,000 to the estimated cost of the construction of the memorial; that the State of Missouri has consented to the acquisition by the United States of the lands necessary for such project; that the memorial will commemorate the territorial expansion of the United States and preserve the historial associations connected therewith for the benefit, education, and inspiration of the American people; and that the President finds that the construction of the Memorial will provide work relief and increase employment by providing for a useful project. It appears that only a part of the sum of $22,500,000 to be contributed by the Government for the proposed project is now available.

Held: (1) The proposed project is one which the President is authorized to adopt and prosecute under title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935.

(2) The President has no authority to commit the Congress to future appropriations for the proposed project, and the Government may not legally accept the sum of $7,500,000 from the City of St. Louis unless the authorization for the project provides for its construction and completion with funds now available and at the disposal of the President.

(3) Since the full sum of $22,500,000 required to be contributed by the President is not now available for the project the proposed Executive order is unauthorized.

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(4) If the Congress should adopt this project as a Federal project, to be constructed at a cost of $30,000,000, the City of St. Louis to contribute $7,500,000 and the Government $22,500,000, the President would be authorized to adopt such portion of the project as he might desire, as a project to be carried out under title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935, and also to allocate thereto such funds as might then be available under the latter Act and to proceed immediately with the expenditure of such allocation.

DEPARTMENT OF JUSTICE,
November 18, 1935.

SIR: I am herewith transmitting without my approval a proposed executive order approving the establishment and authorizing the construction of the Thomas Jefferson Territorial Expansion Memorial.

The proposed order recites that the United States Territorial Expansion Memorial Commission was created pursuant to Public Resolution No. 32, 73d Congress, approved June 15, 1934 [48 Stat. 567]; that the said Commission thereafter on May 1, 1935, made a report recommending the establishment and construction of a permanent memorial on the site and in accordance with the plans set out in the report at an estimated cost of $30,000,000; that the City of St. Louis, Missouri, has agreed to contribute the sum of $7,500,000 toward the estimated cost of the construction of the said memorial; that the State of Missouri has consented to the acquisition by the United States of the lands necessary for such project; that the memorial will commemorate the territorial expansion of the United States and preserve the historical associations connected therewith for the benefit, education, and inspiration of the American people; and that the President finds that the construction of the memorial will provide work relief and increase employment by providing for a useful project.

Upon the basis of these recitals, the order approves the establishment and construction of the project upon the site approved by the Commission in accordance with the plans and specifications submitted by it, at an estimated cost of $30,000,000, and authorizes and directs the Secretary of the Interior, through the National Park Service, to proceed with the construction thereof and to acquire by purchase or by the power of eminent domain the necessary lands therefor;

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with the proviso that no funds allocated for the project shall be expended until the City of St. Louis shall have made available to the Secretary of the Interior for expenditure in connection with the project the sum of $7,500,000.

Assuming the existence of the facts recited in the order, I am of the opinion that the proposed project is one which the President may adopt and prosecute under the provisions of Title II of the National Industrial Recovery Act (48 Stat. 200), and the Emergency Relief Appropriation Act of 1935 [Public Resolution No. 11, 74th Congress; 49 Stat. 115]. On September 23, 1935, the Acting Attorney General approved a proposed order adopting the project and authorizing its construction under the authority of these Acts. The chief difference between the order approved by the Acting Attorney General and the instant order is that the former made a definite allocation from funds made available by the Emergency Relief Appropriation Act of 1935 of the sum of $22,500,000 for the construction of the project, whereas the latter adopts the project under Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935 but makes no allocation of funds for its construction. This difference, of itself, is not, in my opinion, material; for it is my view that as a matter of law the adoption of the project under the authority recited, and the acceptance of the $7,500,000 from the City of St. Louis, commit the sum of $22,500,000 of the funds available under the Emergency Relief Appropriation Act of 1935 to the construction of the project.

The Missouri enabling statute under which the City of St. Louis voted to issue its bonds for $7,500,000 provides that if at any time the United States, or any qualified authority thereof, shall propose to establish and improve within any city in that State having a population of 400,000 inhabitants or more, a national park or plaza intended and designed to commemorate any great event or movement in our national history, to be accessible to the public under Federal legislation and to cover an area within such city of not less than 1,000,000 square feet, an election may be held in the city to determine whether it shall incur an indebtedness and evidence the same by the issuance of bonds for the purpose of providing funds to pay by way of assistance to the United

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States, or any qualified authority thereof, in consideration of and in order to induce the location and establishment within the city of such park or plaza, a sum not exceeding one-fourth of the total amount to be expended by the United States, or its authority, for the acquisition and establishment of such park or plaza. In construing this statute and in passing upon the validity of the bonds voted by the City of St. Louis, the Supreme Court of Missouri held that the United States Territorial Expansion Memorial Commission is a duly qualified authority of the United States; that the United States, through that Commission, has made a proposal such as is required by the enabling act; that the President of the United States, under the provisions of Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935, has authority to adopt the proposed project as a project of the United States Government; and that the said acts make available and authorize the grant of funds for the construction of the project. The Court then says:

"It follows that when the 'Park' or 'Plaza' is definitely located within the City of St. Louis by the United States Territorial Expansion Memorial Commission and the general plans for its construction are approved by the executive order of the President of the United States as a basis for the allotment of the funds necessary for its construction, substantially in accord with the proposal of the United States Commission, the bonds may all be sold and the proceeds derived from such sale delivered to the agency of the United States Government which is now or may be hereafter directed and empowered to acquire and construct the 'Park' or 'Plaza' so located and approved." *Vrooman* v. *City of St. Louis*, 88 SW (2d) 189, 199).

The only authority of the President for the adoption and construction of this project is contained in Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935. The only funds available for the construction of this project are those made available by the latter act. The President has no authority to commit the Congress to future appropriations for the completion of this project. It follows, therefore, that any executive order, to operate as a *legal* basis for the allotment of funds neces-

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sary for the construction and completion of the project in accordance with the approval of the Commission and the plans and specifications submitted by it, must provide for the construction and completion of the project out of funds now available and at the disposal of the President. The Government, in my opinion, would have no legal right to accept the $7,500,000 from the City of St. Louis upon any other basis. Although the acceptance of the fund of $7,500,000 from the City of St. Louis and the partial construction of the project with that fund and other funds now available might well be said to bind the Government morally to complete the project, it would not legally do so, for the President has no authority to commit the Congress to future appropriation for the project.

In view of these considerations, the provisions of the Missouri enabling act, and the above-cited opinion of the Supreme Court of Missouri, it is my view that for the order to be valid there must be available the full sum of $22,500,000 for the completion of the project. I am informed, however, that although there are some funds available under the Emergency Relief Appropriation Act of 1935 for use on this project, the full sum of $22,500,000 is not now available for such purpose. I am of the opinion, therefore, that you cannot legally issue the proposed order.

It is my further opinion, however, that if the Congress should adopt this project as a Federal project, to be constructed at a cost of $30,000,000, the City of St. Louis to contribute $7,500,000 and the Government $22,500,000, you would then be authorized to adopt such portion of the project as you might desire, as a project to be carried out under the provisions of Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935, and also to allocate thereto such funds as may then be available under the Emergency Relief Appropriation Act of 1935 and to proceed immediately with the expenditure of such allocation.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

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QUESTIONS ARISING UNDER THE NATIONAL HOUSING ACT

A loss occurring prior to the termination of a contract of insurance under section 205 (c) and (d) of the National Housing Act of which the Federal Housing Administrator is given due and timely notice, followed by foreclosure of the mortgage and conveyance of title to the Administrator, is to be adjusted in like manner as though the contract had not expired.

The amount required to support debentures issuable in payment of such a loss is to be deducted when ascertaining the distributable "credit balance" under the said section.

Mortgages under which foreclosure proceedings have been commenced or as to which the right to foreclose has accrued and is duly prosecuted, with timely notice to the Administrator, are to be treated as though already foreclosed and hence not "outstanding."

A mortgage is to be regarded as in good standing, under section 205 (c), if the Administrator is without notice of a default or if the mortgagee has waived his right under the insurance contract with respect to a known default.

A proposed requirement by regulation and by contract that the mortgagee keep the mortgaged premises insured against fire and other hazard if the mortgagor fails to do so is reasonable—perhaps even is implied in the terms of the statute.

There is no requirement that the mortgagee replace or repair a destroyed or damaged building before conveying the property to the Administrator, under the provisions of section 204 (a), but there is an implied requirement that the mortgagee must act prudently in all the circumstances.

"The value of the mortgage on the date of the delivery of the property to the Administrator," for the purpose of issuing debentures in payment of insurance under section 204 (a), is the whole amount of the principal actually unpaid by the mortgagor.

The Administrator is authorized to provide by regulation and by contract that a "marketable title" will be satisfactory under section 204 (a) and that the title approved by the Administrator and determined to be a marketable one at the time the insurance is written will be accepted as satisfactory in the adjustment of any claims for the insurance benefits if unimpaired by any act or omission of the mortgagee or other event occurring subsequent to the date the mortgage was accepted for insurance.

The Administrator may provide by regulation that there shall be included as "taxes" under section 204 (a) of the Act such assessments and water rates as have been paid by the mortgagee, and are recognized as taxes under the local law and by operation thereof are prior liens upon the mortgaged property.

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DEPARTMENT OF JUSTICE,
November 26, 1935.

SIR: Under date of September 23, you requested my opinion upon five separate questions which have arisen under the National Housing Act (approved June 27, 1934 [48 Stat. 1246]), as amended by the Act of May 28, 1935. The questions relate to "low-cost housing insurance", authorized by Section 207, but require an interpretation of the italicized words in the following excerpts from other sections of Title II, dealing generally with "mutual mortgage insurance"—

"PAYMENT OF INSURANCE

"SEC. 204 (a) In any case in which the mortgagee under an insured mortgage shall have foreclosed and taken possession of the mortgaged property in accordance with regulations of, and within a period to be determined by, the Administrator, or shall, with the consent of the Administrator, have otherwise acquired such property from the mortgagor after default, *the mortgagee shall be entitled, upon the prompt conveyance to the Administrator of title to such property satisfactory to him* and the assignment to him of all claims of the mortgagee against the mortgagor arising out of the mortgage transaction or foreclosure proceedings, to receive the benefits of the insurance as hereinafter provided. Upon such conveyance and assignment the obligation of the mortgagee to pay the annual premium charges for insurance shall cease and the Administrator shall issue to the mortgagee *debentures having a total face value equal to the value of the mortgage on the date of the delivery of the property to the Administrator*, and a certificate of claim, as hereinafter provided. For the purposes of this subsection, the value of the mortgage shall be determined, in accordance with rules and regulations prescribed by the Administrator, by adding to the amount of the principal of the mortgage which is unpaid on the date of such delivery, (1) interest on such unpaid principal from the date foreclosure proceedings were instituted or the property was otherwise acquired as provided in this subsection to the date of such delivery at the rate provided for in the debentures issued to the mortgagee, less any amount received on ac-

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count of interest accruing on such unpaid principal between such dates, and (2) the amount of all *payments which have been made by the mortgagee for taxes* and insurance on the property mortgaged. * * *

"(c) The certificate of claim issued by the Administrator to any mortgagee shall be for an amount which the Administrator determines to be sufficient, when added to the face value of the debentures issued to the mortgagee, to equal the amount which the mortgagee would have received if, at the time of the conveyance to the Administrator of the property covered by the mortgage, the mortgagor had redeemed the property and paid in full all obligations under the mortgage and those arising out of the foreclosure proceedings. * * *" [48 Stat. 1249; 49 Stat. 300].

"CLASSIFICATION OF MORTGAGES AND REINSURANCE FUND

"SEC. 205. (a) Mortgages accepted for insurance under this title shall be so classified into groups that the mortgages in any group shall involve substantially similar risk characteristics and have similar maturity dates. Premium charges received for the insurance of any mortgage, the receipts derived from the property covered by the mortgage and claims assigned to the Administrator in connection therewith, and all earnings on the assets of the group account, shall be credited to the account of the group to which the mortgage is assigned. The principal of and interest paid and to be paid on debentures issued in exchange for any mortgage, payments made or to be made to the mortgagee and the mortgagor as provided in section 204, and expenses incurred in the handling of the property covered by the mortgage and in the collection of claims assigned to the Administrator in connection therewith, shall be charged to the account of the group to which such mortgage is assigned.

"(b) The Administrator shall also provide, in addition to the several group accounts, a general reinsurance account * * *.

"(c) Whenever the credit balance in any group account exceeds the remaining unpaid principal of the then outstanding mortgages assigned to such group by an amount equal to 10 per centum of the total premium payments which have

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theretofore been credited to such account, *the Administrator shall terminate the insurance* as to that group of mortgages (1) by *paying to each of the mortgagees holding an outstanding mortgage* assigned to such group a sum sufficient, if such mortgage is in good standing, to pay off such mortgage in full, the payment in each case being for the benefit and account of the mortgagor, and (2) by transferring the remainder of such credit balance to the general reinsurance account provided for in subsection (b).

"(d) If the credit balance in any group account fails to exceed, until the final year prior to the maturity date of the mortgages assigned to such group, the remaining unpaid principal of the then outstanding mortgages assigned to such group by an amount equal to 10 per centum of the total premium payments which have theretofore been credited to such account, *the Administrator shall terminate the insurance* as to that group of mortgages (1) by transferring to the general reinsurance account provided for in subsection (b) an amount equal to 10 per centum of the total premium charges theretofore credited to such group account, and (2) by *distributing the remainder of such credit balance*, if any, pro rata to the mortgagees for the benefit and account of the mortgagors of the mortgages assigned to such group."

A draft of a proposed contract was submitted with your letter and the questions were stated with relation to particular provisions of the contract, but it has been concluded, after conferences with representatives of the Federal Housing Administrator, who framed the questions, that it will be mutually more satisfactory to deal herein with the provisions of the statute, rather than with those of the proposed contract. The Administrator has restated the questions with this in view and, thus restated, they are hereinafter set forth and considered separately.

"*Question No. 1.*—Is the potential right to receive the benefits of mortgage insurance under Section 204 (a) of the Act which arises in favor of a mortgagee upon default of the mortgagor under the mortgage, affected or impaired by a subsequent termination of the insurance pursuant to Section 205 (c) or (d) of the Act?"

This question concerns the effect to be attributed to the "termination" of the insurance under Section 205 (c) and

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(d). The General Counsel of the Federal Housing Administration has concluded that such "termination" of the insurance will not affect or impair rights or claims of the mortgagee (the beneficiary under the contract) arising out of a default of the mortgagor occurring prior to such "termination."

The insurance is necessarily written to cover a certain term, and the provisions of Section 205 (c) and (d) fix this term with respect to the mortgages assigned to each group as *terminating* either during the final year prior to the maturity date of the mortgages assigned to such group or upon the prior happening of a contingency—the accumulation in the group account of a distributable amount more than sufficient "to pay off * * * in full", as provided in Section 205 (c), the insured mortgages payable from such account. This apparent purpose of "termination"—the fixation of the term at risk—must be borne in mind when interpreting the language of the Section.

It is not contemplated or always possible that all liabilities accruing under an insurance contract can be adjusted before the term at risk expires because, aside from delays incident to investigation, etc., a loss may occur during the last minute of the term; and neither sound reason nor the spirit of the statute warrants attributing to words employed with evident purpose merely to mark the end of the period covered by the insurance, the effect also of barring valid claims theretofore arising and not practically possible of earlier adjustment, with result both inequitable and contrary to common practice in insurance.

It follows that a loss occurring prior to the expiration of the insured term and of which the Administrator is given due and timely notice, followed by foreclosure of the mortgage and conveyance of title to the Administrator, as provided in the statute, is within the insurance whether adjusted prior or subsequent to the expiration of the term insured; that the amount required to support the debentures issuable in payment of such claims is to be deducted in ascertaining the distributable "credit balance"—this being a corollary of the first conclusion and avoiding the absurdity of regarding as distributable surplus money in fact required for the eventual satisfaction of an accrued

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liability; and that mortgages under which foreclosure proceedings have been commenced or as to which the right to foreclose has accrued and is duly prosecuted, with timely notice to the Administrator, are to be treated as though already foreclosed and hence not "outstanding." These conclusions are corroborated by the principle of statutory construction which permits attribution to a word of a sense beyond its mere literal meaning in order to avoid unduly harsh or absurd results and in order to give effect to the spirit and probable purpose of a statute—to make it reasonably workable rather than to obstruct its successful operation. *United States* v. *Oregon &c. Railroad*, 164 U. S. 526, 539; *United States* v. *Katz*, 271 U. S. 354, 357; *Sorrells* v. *United States*, 287 U. S. 435, 446–447.

The provision of Section 205 (c), "by paying to each of the mortgagees holding an *outstanding mortgage* assigned to such group a sum sufficient, if such mortgage *is in good standing*, to pay off such mortgage in full," has been given careful consideration in arriving at the conclusions stated above and requires mention here because the words "outstanding mortgage" should not be given a construction which would make the phrase, "if such mortgage is in good standing," devoid of meaning. While the statute does not define the words "in good standing," they obviously contemplate a mortgage under which there has been no default by the mortgagor in payment or other duty—such, for example, as the mortgagor's duty to keep the mortgaged property insured against a stipulated hazard. If the mortgagor is so in default the mortgage is not, strictly, in good standing; but it lies entirely with the mortgagee whether to notify the Administrator, foreclose the mortgage, and claim the benefits of the insurance (in which event the mortgage would cease to be outstanding); or whether, in the alternative, to waive the default and permit the mortgage to remain outstanding. Thus the Administrator, by reason of the mortgagee's failure to report may be ignorant of the mortgagor's default, or the default may have been waived expressly by the mortgagee. The Administrator can take cognizance only of reported defaults; if he is without notice of the default, the mortgage, so far as he is concerned, is in good standing. The Administrator could not reasonably

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administer the statute upon any other basis. The mortgagee, in so far as the Administrator and the mortgage insurance are concerned, may waive the mortgagor's default either by silence in failing to report or expressly. In the absence of notice, where notice is required, or in the event of waiver by one who has the right to waive, the fact undisclosed or waived may be treated as non-existent.

Question No. 1 is therefore answered in the negative.

"*Question No. 2.*—Is the Administrator authorized under Section 204 (a) to accord the benefits of the mortgage insurance to a mortgagee upon the conveyance and assignment provided for in said section notwithstanding that the buildings or improvements located on the mortgaged property may have been damaged or destroyed?"

The Administrator insures only the payment of the mortgage debt, in accordance with the terms of the mortgage. The Act puts the duty upon the Administrator of requiring in the mortgage such terms, conditions and provisions as shall be satisfactory to the Administrator. He could not properly be satisfied with less than customary insurance clauses, definition of the mortgagee's duties and approval of the validity of the insurance and the responsibility of the insurer by the Administrator. The Administrator contemplates requiring, by regulation and by contract, that the mortgagee keep the mortgaged premises insured "to the full insurable value thereof" against fire and other usual hazards if the mortgagor fails to do so. That course is reasonable and perhaps implicit in the statute; but, in any event, it is advisable that it be expressly required by regulation and by contract, as is contemplated.

The statute does not expressly provide that a destroyed or damaged building must be replaced or repaired by a mortgagee who has foreclosed and is about to convey title to the Administrator, and there seems to be no occasion for implying such a condition; but in stating this conclusion I assume that the contractual obligations of the mortgagee respecting the hazard insurance on the mortgaged property have been duly performed, including, as set forth in the contract submitted to me, the assignment to the Administrator of "any claim on account of * * * fire, flood, tornado or other hazard insurance," and, furthermore, that the insurance, if

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collected, has been applied in reduction of the mortgage debt or in other proper manner.

The answer to Question 2 is in the affirmative.

"*Question No. 3.*—In determining the 'value of the mortgage on the date of the delivery of the property to the Administrator' as provided in Section 204 (a) should the Administrator deduct from the amount of the principal of the mortgage which is unpaid on the date of such delivery the amount bid by the mortgagee for the property at the foreclosure sale?"

This concerns the meaning to be attributed to the words, "value of the mortgage on the date of the delivery of the property to the Administrator," when determining the amount of the debentures to be issued in payment of claims under Section 204 (a). To illustrate the matter: a mortgage under which a default has occurred has a value of $5,000; the mortgagee, in order to get the benefits of the insurance, must foreclose and take possession of the mortgaged property, and in so doing he is required to submit a bid of $4,000—which, in practice, is credited in reduction of the mortgage debt. The Act provides that after the foreclosure the mortgagee must transfer to the Administrator the title which he has acquired, along with all claims "against the mortgagor arising out of the mortgage transaction or foreclosure proceedings," and that he is entitled to receive "debentures having a total face value equal to the value of the mortgage on the date of the delivery of the property to the Administrator," together with a contingent certificate of claim for an additional amount payable only if the Administrator ultimately realizes sufficient upon the property conveyed to him, and covering, in particular, the costs of the foreclosure. Is the Administrator to issue debentures on the basis of the $5,000 value of the mortgage at the time of the foreclosure, or on the basis of a value of $1,000?

The statute defines "value of the mortgage" as "the amount of the principal of the mortgage which is unpaid" plus certain accrued interest and payments for taxes and insurance, and the amount of the principal actually unpaid by the mortgagor in the supposed case is $5,000. To say that the amount of the principal which is unpaid is $1,000 would

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produce an absurdity. Of course, no one would surrender for $1,000 in debentures property just bid in for $4,000 at foreclosure sale; and if it be assumed that the difference might by covered by the contingent certificate of claim this would be equally absurd because, paradoxically, subordinating so large a part of the claim of the insured to complete recoupment of the insurer that the former would actually assume practically all of the risk. The only reasonable construction of the statute is that the amount of any bid ordinarily creditable to reduction of the mortgage debt is not to be taken into consideration, and that debentures are to be issued to an amount equal to such principal of the mortgage as is unpaid by the mortgagor, plus the interest, taxes and insurance specified in the statute. It is obvious that this construction results in no unjust enrichment of the mortgagee at the expense of the Administrator or any one else, since Section 204 (a) provides for "the assignment to him (the Administrator) of all claims of the mortgagee against the mortgagor arising out of the mortgage transaction or foreclosure proceedings."

"*Question No. 4.*—(a) May the Administrator provide by regulation and contract that a marketable title is a title satisfactory to him within the meaning of Section 204 (a)?

"(b) May the Administrator, having examined a title and found it to be a marketable title as of the date the mortgage is accepted for insurance contract that such title will be accepted as satisfactory in the adjustment of any claim for the benefits of the mortgage insurance under Section 204 (a) provided that such title is unimpaired by any act or omission of the mortgagee or other event occurring subsequent to the date the mortgage was accepted for insurance?"

Section 204 (a) provides that "in any case in which the mortgagee under an insured mortgage shall have foreclosed and taken possession of the mortgaged property" he shall be entitled to receive the benefits of the insurance "upon the prompt conveyance to the Administrator of title to such property satisfactory to him" (the Administrator).

The provision concerning title "satisfactory to the Administrator" does not contemplate a mere capricious pronouncement by the Administrator in particular cases that the

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title is, or is not, satisfactory, nor does it contemplate determinations uncontrolled by rule or standard and, therefore, lacking in uniformity so that title might be found satisfactory in one case but unsatisfactory in another without reasonable basis for distinction. Plainly the Administrator must have authority to declare by rule or regulation the type of title which he will accept as satisfactory, and his contemplated determination that a "marketable title" will be accepted represents a reasonable exercise of the authority and discretion conferred upon him.

It is to be assumed that title determined by the Administrator to be satisfactory, at the time of and in connection with the application for the mortgage insurance, will continue satisfactory unless affected by defects originating subsequent to that determination. The insurance must be premised upon that hypothesis. Postulating the existence of some factor bearing upon the satisfactory character of title and, therefore, requiring the exercise of judgment, it cannot be supposed that the question, having been once decided and acted upon, later should be examined again and perhaps differently resolved, with the effect of vitiating a contract made in consequence of, and in reliance upon, the original determination. Indeed, it may be doubted that persons exercising ordinary prudence would do business with the Administrator upon any such basis; and the canons of construction require that a statute be given an interpretation which will make it workable rather than one which will hinder its operation. It is to be further observed that the existence of title insurance on property is contemplated when mortgages on such property are insured under the statute, as indicated by provisions in the proposed contract and regulations submitted to me by the Administrator, and that the benefit of such title insurance is intended to accrue to the Administrator by virtue of proper assignment.

It is, therefore, my opinion that the Administrator is authorized to provide by regulation and by contract, as contemplated, that a "marketable title" will be satisfactory under Section 204 (a), and that a title examined by the Administrator and determined to be marketable at the time the mortgage is accepted for insurance will be accepted

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as satisfactory in the adjustment of any claim for the benefit of the insurance under the said section, provided that such title is unimpaired by any act or omission of the mortgagee or other event occurring subsequent to the date the mortgage was accepted for insurance.

"*Question No. 5.* Is the Administrator authorized to provide by regulation that assessments and water rates which are prior liens upon the mortgaged premises and have been paid by the mortgagee shall be included as taxes under Section 204 (a)?"

Section 204 (a) provides that in determining "the value of the mortgage" for the purpose of issuing debentures in payment of the insurance there shall be added "the amount of *all payments* which have been made by the mortgagee *for taxes* and insurance." The term "tax", in its strict legal sense, does not include either water rates or assessments for local improvements, but it is often used in "a much more comprehensive sense, * * * in a general sense as denoting a burden or charge." *Metropolitan Street Ry. Co.* v. *New York*, 199 U. S. 1, 44; Bouvier's Law Dictionary.

The evident purpose of Section 204 (a), in the particular here involved, is to protect the mortgagee in the payment by him of those charges made against the property by a state or a political subdivision thereof which must be paid in order to protect the title to the property and to avoid sale of it by public authority to satisfy liens attaching by operation of the local law; and this purpose is furthered only by attributing to the term "taxes", in proper cases, the more comprehensive meaning. In each case, however, the question must depend upon the local law under which the charge is levied. If, and to the extent that, the charge is a tax under the local law, creating a lien upon the property subject to foreclosure by public authority, it is to be regarded as a tax under the National Housing Act; but if it is not so recognized as a tax locally and does not, therefore, create such a prior lien upon the mortgaged property there is no reason for considering it as a tax in the administration of the Federal statute.

It is, therefore, my opinion upon this question that the Administrator is authorized to provide by regulation for

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including as "taxes", when determining the "value" of a mortgage, such assessments and water rates paid by the mortgagee as are recognized as taxes under the local law and by operation thereof made prior liens upon the mortgaged property.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the PRESIDENT.

AUTHORITY OF SECRETARY OF AGRICULTURE TO DISCLOSE CONFIDENTIAL INFORMATION OBTAINED FROM MILK DISTRIBUTORS, LICENSED UNDER THE AGRICULTURAL ADJUSTMENT ACT

Section 10 (i) of the Agricultural Adjustment Act, as amended by section 18 of the Act of August 24, 1935, does not authorize the Secretary of Agriculture to disclose to State authorities confidential information, furnished by licensed milk distributors prior to the date of the amendment, in violation of the conditions (embodied in regulations and licenses) under which it was obtained.

DEPARTMENT OF JUSTICE.
December 3, 1935.

SIR: I have your letter of October 18 in which you request my opinion as to your authority to comply with the requests of authorities of certain states for information in the possession of your Department relating to the names of distributors of milk; the number, names and locations of their respective producers; the prices which they have paid for milk; and the volume of milk which they have handled.

The applicable statutory provision is contained in Subsection (i) of Section 10, which was added to the Agricultural Adjustment Act by Section 18 of the Act of August 24, 1935 [49 Stat. 767], and reads as follows:

"(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint

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hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and *to make available to such State authorities the records and facilities of the Department of Agriculture: Provided*, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof." [Italics supplied.]

Your letter indicates that the information in question was furnished by holders of licenses (issued under Section 8 of the Agricultural Adjustment Act) which required that the information be supplied and contained the following clause:

"*Confidential Information.*—To the extent not otherwise expressly provided by this License, all information in the possession of the Secretary, the Market Administrator, their agents, or any official, which relates to the business or property of any person and which was furnished by or obtained from such person pursuant to the requirements of this License, shall be kept confidential in accordance with the applicable General Regulations of the Agricultural Adjustment Administration."

The regulations mentioned in the quoted paragraph of the licenses provided that "information in the possession of any official which relates to the business or property of any person and which was furnished by or obtained from such person pursuant to the requirements of any marketing agreement or license * * * shall be kept confidential and shall not be disclosed, divulged or made public" except when required for use in a judicial proceeding or administrative hearing, or "upon lawful demand made by the President, or by either House of the Congress or any committee

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thereof," or when required by "other officials for use in the regular course of their official duties." It was further provided, however, that "such information may be combined and published in the form of general statistical studies or data in which the identity of the person furnishing such information or from whom it was obtained shall not be disclosed."

The Agricultural Adjustment Act (Sec. 10c, 48 Stat. 37) expressly authorized the Secretary of Agriculture, with approval of the President, " to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him," and I have no doubt that the above-mentioned regulations represented a valid exercise of this authority.

The provision of the amendatory Act of August 24, 1935, authorizing the Secretary " to make available to * * * state authorities the records and facilities of the Department of Agriculture," should be given a reasonably broad construction, but it necessarily does not contemplate unrestricted availability of every record and every facility of the Department of Agriculture with complete lack of distinction. A particular record or class of records might be, not only confidential, but wholly irrelevant. Furthermore, I think we must indulge the presumption that agreements with citizens, made by administrative officers acting pursuant to statutory authority, will be honored by the Congress. Indeed, the provisions of the amendatory act concerning the keeping confidential of information furnished the Secretary thereunder might be regarded as idle, and certainly would lose some force, if coupled with another provision properly interpreted as violating an earlier agreement respecting the non-disclosure of confidential information obtained prior to the date of the amendment. In this connection it is to be observed that the provision in the amendment concerning the disclosure to state authorities in confidence of information furnished the Secretary under new Section 8d does not relate to information obtained under another section of the original act prior to the date of the amendment.

My conclusion is that the statute does not authorize a disclosure of *confidential* information in violation of the con-

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ditions (embodied in the regulations and licenses) under which it was obtained, but that you are authorized to supply the state authorities with compilations, statistics and data which do not identify an individual or individuals, as provided in the regulations and in the licenses, including also mere lists of the names and addresses of producers, distributors, etc. Beyond this the information requested should not be given unless it relates to something which you know to be of general knowledge or publicized by the producers or distributors themselves and therefore not to be regarded as confidential.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF AGRICULTURE.

COMPROMISE OF OFFENSES AGAINST THE HARRISON NARCOTIC ACT IN PUERTO RICO

Offenses committed in Puerto Rico against the Harrison Narcotic Act may be compromised under section 3229 of the Revised Statutes. Such compromises may be made by the local authorities, and the proceeds thereof may be retained by the Puerto Rican Government.

Where doubt exists as to the construction of a statute great weight is properly given to the construction given it by the Executive Department charged with its Administration, and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.

DEPARTMENT OF JUSTICE,
December 7, 1935.

SIR: I have your letter of October 5, 1935, in which you state that the Puerto Rican authorities have requested your advice as to whether they have the power to compromise offenses committed in Puerto Rico against the Harrison Narcotic Act, and you therefore request my opinion on the following questions:

(1) Is section 3229 of the Revised Statutes applicable to offenses under the Harrison Narcotic Act committed in Puerto Rico?

(2) If the answer to the first question is in the affirmative, is the authority to effect compromises vested in the officers of

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the United States Treasury Department or in the Puerto Rican officials?

(3) To which Government do the proceeds of compromises belong?

Section 2 of the Harrison Narcotic Act (38 Stat. 786; U. S. C, title 26, sec. 1053) provides in part:

"The provisions of this Act shall apply to the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, the insular possessions of the United States, and the Canal Zone."

Section 7 of the Act provides:

"That all laws relating to the assessment, collection, remission, and refund of internal revenue taxes, including section thirty-two hundred and twenty-nine of the Revised Statutes of the United States, so far as applicable to and not inconsistent with the provisions of this Act, are hereby extended and made applicable to the special taxes imposed by this Act."

Section 3229 of the Revised Statutes provides in part:

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; * * *"

Under the provisions of section 2 above quoted the Harrison Narcotic Act is made applicable to Puerto Rico.

Section 7 of the Act specifically provides that section 3229 of the Revised Statutes is made applicable to "the special taxes" imposed by the Act.

If this were a novel proposition the reference only to "the special taxes" might well raise a doubt as to whether the compromise of criminal liability incurred under the Act would be authorized. However, I am informed by officials in your Department that for more than twenty years the uniform administrative practice of the Treasury Department has been to compromise both criminal and civil liability under the Harrison Narcotic Act, and to cover the proceeds into the Treasury as "miscellaneous internal-revenue receipts". Where there is a doubt as to the construction of a statute great weight is properly to be given to the construc-

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tion consistently given to it by the executive department charged with its administration. *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337; *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healey*, 160 U. S. 136. And such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required; *United States* v. *Johnston*, 124 U. S. 236, 253; *Hawley* v. *Diller*, 178 U. S. 476, 488; *United States* v. *Jackson*, 280 U. S. 183, 193.

Applying this rule in the light of the long and uniform administrative practice, I perceive no reason why it should now be disturbed, particularly since it appears that the Congress has recognized and approved such practice in recent legislation. Pursuant to the authority vested in the Secretary of the Treasury by the Act of March 3, 1927 (44 Stat., pt. 2, 1381), establishing a Bureau of Customs and a Bureau of Prohibition in the Treasury Department, the Secretary transferred the authority to compromise criminal and civil liability in narcotic cases from the Commissioner of Internal Revenue to the Commissioner of Prohibition (T. D. No. 1, April 1, 1927, Art. VI, pars. (1) (h)), who actually continued to exercise this power until the Bureau of Narcotics was created by the Act of June 14, 1930 (46 Stat. 585). Since the passage of the latter act the power to compromise narcotic cases has been exercised by the Commissioner of Narcotics. It is to be assumed that Congress had notice of the interpretation with respect to the power to compromise criminal liability in narcotic cases as expressed in Prohibition Treasury Decision No. 1, and therefore recognized and approved the administrative practice by authorizing the Secretary in the Act of June 14, 1930 to confer or impose the same powers on the Commissioner of Narcotics. Accordingly, it is my conclusion that offenses committed in Puerto Rico against the Act may be compromised under section 3229 of the Revised Statutes.

The administration of the Act in Puerto Rico is also provided for in section 2 of the Act, which reads in part:

"In Porto Rico and the Philippine Islands the administration of this Act, the collection of the said special tax, and the

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issuance of the order forms specified in section two shall be performed by the appropriate internal-revenue officers of those governments, and all revenues collected hereunder in Porto Rico and the Philippine Islands shall accrue intact to the general governments thereof, respectively" [38 Stat. 787].

The power vested in certain officials of the Treasury Department to compromise criminal and civil liability in narcotic cases, under section 3229 of the Revised Statutes, is incident to and an important aid in administrative enforcement. It would seem, therefore, that in delegating the administration of the Act to the Puerto Rican officials Congress must have intended to confer upon those officials the incidental administrative power to compromise. This view is supported by reason as well as by the practice in the administration of the Act in the Philippines, where, you state, offenses under the Act have long been compromised by the insular authorities. Accordingly, it is my conclusion that the authority to effect such compromises in Puerto Rico is vested in the Puerto Rican officials.

Section 2 of the Act, above quoted, further provides that "all revenues collected hereunder in Porto Rico and the Philippine Islands shall accrue intact to the general governments thereof, respectively." Since liability incurred under the provisions of the Harrison Narcotic Act arises by reason of the failure to pay the special taxes provided therein, collections made in compromise of civil and criminal liability under the Act appear to be "revenues collected hereunder", and if collected in Puerto Rico will accrue to the general government of Puerto Rico under the above provision of the Act.

It is my opinion, therefore, that offenses against the Harrison Narcotic Act committed in Puerto Rico may be compromised by the local authorities and the proceeds retained by the Puerto Rican Government.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

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DEPOSITORIES FOR PUBLIC MONEY OF THE UNITED STATES IN THE PHILIPPINE ISLANDS—PHILIPPINE INDEPENDENCE ACT

The provisions of section 85 of the Act of July 1, 1902, relating to the designation in the Philippine Islands of depositories for public money of the United States have not been repealed by section 15 of the Philippine Independence Act of March 24, 1934.

DEPARTMENT OF JUSTICE,
December 7, 1935.

SIR: Reference is made to the letter of the Acting Secretary of the Treasury of October 3, 1935, in which my opinion is requested as to whether or not the provisions of the Act of July 1, 1902, 32 Stat. 711 (Section 85, relating to the designation in the Philippine Islands of depositories for public money of the United States) have been repealed by section 15 of the Philippine Independence Act, approved March 24, 1934 (48 Stat. 456, 464).

Section 85 of the Act of July 1, 1902, reads:

"That the treasury of the Philippine Islands and such banking associations in said islands with a paid up capital of not less than two million dollars and chartered by the United States or any State thereof as may be designated by the Secretary of War and the Secretary of the Treasury of the United States shall be depositories of public money of the United States, subject to the provisions of existing law governing such depositories in the United States: *Provided*, That the treasury of the government of said islands shall not be required to deposit bonds in the Treasury of the United States, or to give other specific securities for the safe-keeping of public money except as prescribed, in his discretion, by the Secretary of War."

Section 15 of the Philippine Independence Act is as follows:

"Except as in this Act otherwise provided, the laws now or hereafter in force in the Philippine Islands shall continue in force in the Commonwealth of the Philippine Islands until altered, amended, or repealed by the Legislature of the

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Commonwealth of the Philippine Islands or by the Congress of the United States, and all references in such laws to the government or officials of the Philippines or Philippine Islands shall be construed, insofar as applicable, to refer to the government and corresponding officials respectively of the Commonwealth of the Philippine Islands. The government of the Commonwealth of the Philippine Islands shall be deemed successor to the present government of the Philippine Islands and of all the rights and obligations thereof. Except as otherwise provided in this Act, all laws or parts of laws relating to the present government of the Philippine Islands and its administration are hereby repealed as of the date of the inauguration of the government of the Commonwealth of the Philippine Islands."

Since the new government of the Commonwealth of the Philippines was inaugurated on November 15, 1935, the repeal provisions contained in the last sentence of section 15 are now in effect.

It will be noted that the first sentence of section 15 of the Philippine Independence Act is a saving clause which provides that, "except as otherwise provided in this Act," the laws in force in the Philippine Islands shall continue in force in the Commonwealth of the Philippines unless altered, amended or repealed by the legislature of the Commonwealth, or by the Congress of the United States; whereas the last sentence of section 15 is a repealing clause which provides that, "except as otherwise provided in this Act," all laws or parts of laws relating to the "present government of the Philippine Islands and its administration" are repealed as of the date the new government is inaugurated. Thus the repealing clause refers only to the laws relating to the *former government* of the Philippine Islands and *its administration*, while the saving clause refers to the *laws now or hereafter in force* in the Philippine Islands. It seems clear, taking these two clauses together, each expressly excepting the other, that they were intended to and do refer to different classes of laws: the saving clause, to the general laws in force in the Islands at the time of the inauguration of the new government; the repealing clause, to the limited class of laws, which may be designated as political in char-

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acter, affecting only the old form of government and its administration. Naturally, the latter class of laws would not be applicable to the new form of government and logically would be superseded upon its advent. Indeed, if the repealing clause were absent, such laws, insofar as they might be inconsistent or in conflict with the provisions for the new government, would be held to be repealed by necessary implication.

On the other hand, it would be unreasonable to suppose that the Congress intended that the general laws in force in the Islands should be repealed upon the inauguration of the new government, leaving a lawless and chaotic hiatus until new laws should be passed by the legislature of the new government or by the Congress of the United States. The saving clause apparently was inserted to anticipate any such untoward result. There is nothing in the provisions of the Act relating to the establishment of the new government indicating any intent suddenly to overthrow the existing body of law, whether Federal or Insular, in force in the Philippine Islands, upon the birth of the new Commonwealth. On the contrary, by the saving clause and the repealing clause, the Act discriminatingly incorporates the general rule of public law voiced by the Supreme Court, speaking through Mr. Justice Field, in *Chicago, Rock Island and Pacific Railway Company* v. *McGlinn*, 114 U. S. 542, and quoted in *Downes* v. *Bidwell*, 182 U. S. 244, 298:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of polit-

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ical jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. *American Insurance Co.* v. *Canter*, 1 Pet. 542; Halleck, International Law, ch. 34 § 14. (P. 546, 547)."

This construction of the Act accords also with the rule that a statute is to be construed so as to give effect to all its parts, if possible, since it rationally reconciles the saving and the repealing clauses so that both may stand.

Section 85 of the Act of July 1, 1902, does not seem to fall within the repealing clause of Section 15 of the Philippine Independence Act as a law "relating to the present government of the Philippine Islands and its administration." It merely designates in the Philippines certain depositories of public money of the United States and, permits one of them—the treasury of the Philippine Islands—to qualify as such a depository without furnishing security, except as prescribed, in his discretion, by the Secretary of War. The purpose of Section 85 apparently was to furnish a safe place in which disbursing officers of the United States might deposit the large amounts entrusted to their care, as is evidenced by the Committee report respecting that Section:

"The Treasury of the Philippine Islands is made an authorized depository of the funds of the United States, in accordance with the general desire of disbursing officers, who can not now find a legal depository for the large amounts intrusted to their care." (House Report No. 1540, 57th Congress, 1st Session. See also, House Report No. 2496, 57th Congress, 1st Session.)

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It is, therefore, my opinion that Section 85 of the Act of July 1, 1902, has not been repealed by Section 15 of the Philippine Independence Act of 1934.

I may add that if any mandatory aspect is implicit in Section 85 requiring the treasury of the Philippine Islands to accept deposits, it is to be observed that Section 15 of the Philippine Independence Act expressly provides that "The Government of the Commonwealth of the Philippine Islands shall be deemed successor to the present government of the Philippine Islands and of all the rights and obligations thereof." This provision is adopted by the "Ordinance Appended To The Constitution" of the new government, in Section 1 (7) and Section (3). It thus appears that both the Congress and the new government of the Islands expressly contemplated assumption by the treasury of that government of such obligation to accept the deposits contemplated by Section 85 of the Act of July 1, 1902, as may have rested upon the treasury of the old government. If Section 85 be assumed mandatory in any aspect, still it would not be a law "relating to the present government of the Philippine Islands and its administration" in the sense in which I conceive those words to be used in Section 15 of the Philippine Independence Act of 1934; and, therefore, Section 85 still would not be within the repealing clause and would be within the saving clause of Section 15.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

EFFECT OF CERTAIN PROVISIONS OF THE BANKING ACT OF 1935 ON THE POSTAL SAVINGS ACT OF JUNE 25, 1910, AS AMENDED

1. The mandatory provision of section 2 of the amendment of May 18, 1916, to the Postal Savings Act, requiring postal savings funds to be deposited in member banks of the Federal Reserve System, provided such banks agree to pay interest at the rate of not less than 2¼%, has been repealed by the Banking Act of 1935; and the Board of Trade of the Postal Savings System is now empowered in its discretion to deposit postal savings funds in member banks of the Federal Reserve System at such rate of interest as may be fixed by the Board of Governors.

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2. The uniform-interest requirement of section 2 of the amendment of May 18, 1916, must be deemed repealed by the Banking Act of 1935; and the Board of Trustees of the Postal Savings System may, in its discretion, deposit postal savings funds in member banks of the Federal Reserve System at interest rates which vary in different localities.
3. The said Board of Trustees is not required to dispose of any part of its investments for the purpose of redepositing such funds in qualified banks.
4. Section 341 of the Banking Act of 1935 supplements section 7 of the Postal Savings Act, as amended, with the result that no interest on postal savings deposits is payable in excess of the rate prescribed by the Board of Governors for payment by member banks on savings deposits; and the interest of 2% prevails except that whenever the interest rate prescribed by the Board of Governors is less than 2%, such lower rate shall be paid.

DEPARTMENT OF JUSTICE,
December 26, 1935.

SIR: In your letter of September 27, 1935, you requested my opinion as to the effect of certain provisions of sections 324 and 341 of Title III of the Banking Act of 1935 (Act of August 23, 1935; Public No. 305, 74th Congress) on the Postal Savings Act of June 25, 1910, as amended.

In complying with your request, I shall take up in their order the specific questions submitted in the enclosure contained in your letter.

Question No. 1. "Whether the mandatory feature of the amendment of May 18, 1916, to the organic Postal Savings Act has been annulled with respect to member banks of the Federal Reserve System by the Banking Act of 1935, it being assumed that there has been no change in the law with respect to mandatory deposits in qualified nonmember banks."

Section 2 of the amendment of May 18, 1916 to the Postal Savings Act (39 Stat. 159; U. S. C., Title 39, Sec. 759) provides in part as follows:

"SEC. 2. That postal savings Funds received under the provisions of this Act shall be deposited in solvent banks, whether organized under National or State laws, and whether member banks or not of the Federal reserve system established by the Act approved December twenty-third, nineteen hundred and thirteen, being subject to National or State supervision and examination, and the sums deposited shall bear interest at the rate of not less than two and one-fourth

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per centum per annum, which rate shall be uniform throughout the United States and Territories thereof; * * * The funds received at the postal savings depository offices in each city, town, village, and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this Act and the regulations made by authority thereof: *Provided, however*, If one or more member banks of the Federal reserve system established by the Act approved December twenty-third, nineteen hundred and thirteen, exists in the city, town, village, or locality where the postal savings deposits are made, such deposits shall be placed in such qualified member banks substantially in proportion to the capital and surplus of each such bank, but if such member banks fail to qualify to receive such deposits, then any other bank located therein may, as hereinbefore provided, qualify and receive the same. * * * If at any time the postal savings deposits in any State or Territory shall exceed the amount which the qualified banks therein are willing to receive under the terms of this Act, and such excess amount is not required to make up the reserve fund of five per centum hereinbefore provided for, the board of trustees may invest all or any part of such excess amount in bonds or other securities of the United States. When, in the judgment of the President, the general welfare and interests of the United States so require, the board of trustees may invest all or any part of the postal savings funds, except the reserve fund of five per centum herein provided for, in bonds or other securities of the United States. * * *" (39 Stat. 159).

The effect of the foregoing provisions is that postal savings funds shall be deposited in banks, whether or not they are members of the Federal reserve system, and that the sums deposited shall bear interest at the rate of not less than two and one-fourth per centum per annum, such rate to be uniform throughout the United States. The statute imposes a mandatory duty upon the Board of Trustees of the Postal Savings System to deposit postal savings funds in banks which are willing to receive such deposits under the terms of the Act, i. e., banks which are willing to pay interest at the rate of two and one-fourth per centum, or more. The statute

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does not impose on the banks any obligation to accept deposits on the terms so specified.

Section 341 of Title III of the Banking Act of 1935 (49 Stat. 721), provides in part as follows:

"Section 8 of the Act entitled 'An Act to establish postal savings depositories for depositing savings at interest with the security of the Government for repayment thereof, and for other purposes', approved June 25, 1910, as amended (U. S. C., title 39, sec. 758; Supp. VII, title 39, sec. 758), is amended by striking out the first sentence thereof and inserting in lieu thereof the following: 'Notwithstanding any other provision of law * * * (3) postal savings depositories may deposit funds on time in member banks of the Federal Reserve System subject to the provisions of the Federal Reserve Act, as amended, and the regulations of the Board of Governors of the Federal Reserve System, with respect to the payment of time deposits and interest thereon.'"

Section 324 (c) of the same Act (49 Stat. 714, 715), provides in part as follows:

"The Board of Governors of the Federal Reserve System shall from time to time limit by regulation the rate of interest which may be paid by member banks on time and savings deposits, and shall prescribe different rates for such payment on time and savings deposits having different maturities, or subject to different conditions respecting withdrawal or repayment, or subject to different conditions by reason of different locations, or according to the varying discount rates of member banks in the several Federal Reserve districts."

Thus the amendment of 1935 in effect provides that notwithstanding any other provision of law, postal savings funds may be deposited on time in member banks of the Federal Reserve System subject to the provisions of the Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System relative to the rate of interest which may be paid on such deposits. The Board of Governors is expressly given power to fix the rate of interest.

While repeals by implication are not favored, nevertheless where there is a positive repugnance, or inconsistency between a prior and a later statute, the later enactment repeals the earlier law to the extent of such inconsistency.

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This principle applies to the situation under discussion. While the 1935 statute does not in express terms repeal any part of the 1916 statute, there is a clear inconsistency between them. The 1935 statute in effect provides that postal savings funds may be deposited in member banks of the Federal Reserve System at whatever rate of interest such banks have been directed to pay by regulation of the Board of Governors. This necessarily repeals the earlier provisions to the effect that postal savings funds shall not be deposited with member banks of the Federal Reserve System unless they agree to pay interest at the rate of at least two and one-fourth per centum.

This conclusion is fortified by the consideration that section 341 (3) would add nothing to the pre-existing laws if not interpreted in this manner. Every statute should be so interpreted as to give it some effect. Under section 2 of the amendment of May 18, 1916, the duty was placed upon the Board of Trustees of the Postal Savings System to deposit postal savings funds with qualified member banks of the Federal Reserve System. Hence, if section 341 (3) were construed merely to authorize the deposit of such funds in member banks in case they were willing to receive the deposits under the terms of the Postal Savings Act, it would add nothing to the pre-existing legislation. It would seem to follow, therefore, that Congress must have intended section 341 (3) to authorize the deposit of postal savings funds in member banks at whatever rate of interest those banks were willing to pay.

However, section 341 (3) merely makes permissive, rather than mandatory, the deposit of postal savings funds in member banks at rates lower than those prescribed by section 2 of the Amendment of May 18, 1916. The language of the section is that postal savings depositories *may* deposit funds on time in member banks subject to the provisions of the Federal Reserve Act and the regulations of the Board of Governors regarding interest. It does not state that such funds shall be so deposited; and it is the general rule that permissive words will be construed to be mandatory only where it is necessary to give effect to the clear policy and intention of the legislature. *Farmers and Merchants Bank of Monroe* v. *Federal Reserve Bank*, 262 U. S. 649, 662–663;

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United States v. *Thoman*, 156 U. S. 353, 359; *Thompson* v. *Lessee of Carroll*, 22 How. 422, 434. Manifestly, there is nothing in this Act which tends to show that it was the policy and intention of Congress to make mandatory the deposit of postal savings funds in member banks subject to the regulations of the Board of Governors of the Federal Reserve System.

In view of the foregoing considerations, I answer Question No. 1 in the affirmative, i. e., that the mandatory provision of section 2 of the Amendment of May 18, 1916, requiring postal savings funds to be deposited in member banks of the Federal Reserve System, provided such banks agree to pay interest at the rate of not less than two and one-fourth per centum per annum, has been repealed by the Act of 1935, so that the Board of Trustees of the Postal Savings System is now empowered in its discretion to deposit postal savings funds in member banks of the Federal Reserve System at such rate of interest as may be fixed by the Board of Governors.

Question No. 2. "Whether the Board of Trustees of the Postal Savings System may, in its discretion, have a varying rate of interest for different localities."

Section 2 of the Amendment of May 18, 1916, provides that the interest rate on postal savings funds shall be uniform throughout the United States. However, section 324 (c) of the Act of 1935 provides that the Board of Governors of the Federal Reserve System shall limit by regulation the rate of interest which may be paid by member banks on time and savings deposits, and shall prescribe different rates of interest for such deposits subject to different conditions by reason of different locations. As heretofore indicated this provision is applicable to deposits of postal savings funds in member banks. It follows, therefore, in the light of the conclusion reached in the answer to Question No. 1, that the uniform interest requirement of section 2 of the Amendment of 1916 must be deemed repealed by the Act of 1935. I, therefore, conclude that postal savings funds may be deposited in member banks of the Federal Reserve System at interest rates which vary in different localities, should the Board of Trustees of the Postal Savings System elect to deposit such funds with member banks.

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It follows that I answer Question No. 2 in the affirmative.

Question No. 3. "Whether the Board of Trustees of the Postal Savings System is by law obligated to dispose of any part of its investments for the purpose of redepositing such funds in qualified banks."

Section 2 of the Amendment of May 18, 1916, provides that if at any time the postal savings deposits in any State or territory exceed the amount which the qualified banks therein are willing to receive under the terms of the Act, and such excess amount is not required to make up the reserve fund of five per centum, the Board of Trustees may invest all or any part of such excess amount in bonds or other securities of the United States. It also provides that the Board of Trustees may at any time dispose of such bonds and use the proceeds to meet withdrawals of deposits by depositors.

I understand that the Board of Trustees of the Postal Savings System has invested in Government securities postal savings funds which banks in certain localities have been unwilling to take under the terms of the Act. You suggest that in the event of a reduction of the rate of interest payable on postal savings deposits banks may become desirous of obtaining these deposits which they were unwilling to take previously, and inquire whether the Board of Trustees of the Postal Savings System is obligated to dispose of the securities in which it has invested its funds for the purpose of depositing such funds in qualified banks which have or may become willing to receive the deposits.

As has been demonstrated above, the Act of 1935 does not impose any obligation on the Board of Trustees of the Postal Savings System to deposit funds with member banks of the Federal Reserve System at rates of interest lower than those theretofore received. It merely empowers the Board of Trustees to do so in its discretion. It necessarily follows that the Board of Trustees is under no obligation to dispose of Government bonds or securities and deposit the proceeds at a lower rate of interest than had previously been paid.

Moreover, even if the word "may" in section 341 (3) of the Act of 1935 were construed to mean "shall," so as to impose a duty on the Board of Trustees to deposit funds in member banks at whatever rates of interest they might be paying,

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it still would seem clear that the Board of Trustees would be under no obligation to dispose of Government securities in order to deposit the proceeds in member banks. There is no intimation in the statutes under consideration that a bank which at one time has declined the opportunity to receive postal savings funds on deposit may thereafter change its attitude and insist that the Board of Trustees sell Government securities in order to deposit the proceeds with the bank.

For these reasons I answer Question No. 3 in the negative.

Question No. 4. "Whether the Board of Trustees of the Postal Savings System may legally prescribe a less rate than 2% on postal savings deposits, to be uniform throughout the United States, even though the rate to be prescribed be less than the rate prescribed for savings deposits by the Board of Governors of the Federal Reserve System for certain Federal Reserve districts."

Section 7 of the Postal Savings Act (36 Stat. 816) as amended (U. S. C., Title 39, Sec. 757) provides that—

"* * * interest at the rate of two per centum per annum shall be allowed and entered to the credit of each depositor once in each year * * *."

Section 341 of Title III of the Act of 1935, referred to above, provides that—

"Notwithstanding any other provision of law, (1) each deposit in a postal savings depository office shall be a savings deposit * * *; (2) no interest shall be paid on any such deposit at a rate in excess of that which may lawfully be paid on savings deposits under regulations prescribed by the Board of Governors of the Federal Reserve System * * * for member banks * * * located in or nearest to the place where such depository office is situated * * *" (49 Stat. 721).

As has been noted above, section 324 (c) of the Act of 1935 empowers the Board of Governors of the Federal Reserve System to limit by regulation the rate of interest to be paid by member banks on time and savings deposits, and authorizes it to prescribe different rates of interest for such deposits subject to different conditions by reason of different locations.

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In the light of the rules of statutory construction heretofore discussed, section 341 of the Act of 1935 must be deemed to supplement section 7 of the Postal Savings Act rather than to repeal it in its entirety. Its effect is to provide that no interest shall be paid on any postal savings deposits in excess of the rate prescribed by the Board of Governors for payment by member banks on savings deposits. It follows, therefore, that wherever the interest rate so prescribed is lower than two per centum, such lower rate shall be the rate paid on postal savings deposits. In all other instances the interest rate of two per centum is to prevail.

Consequently, I answer Question No. 4 in the negative.

Respectfully,

HOMER CUMMINGS,

To the POSTMASTER GENERAL.

CITIZENSHIP OF ADOPTED CHILD

A child under twenty-one years of age and actually resident within the United States becomes a citizen upon the naturalization of his mother, under Section 2172 of the Revised Statutes, notwithstanding his previous adoption by another.

The reasoning of the opinion of June 17, 1935, to the Secretary of State, relating to the citizenship of an adopted child, is applicable here.

DEPARTMENT OF JUSTICE,
January 7, 1936.

MADAM: I have the honor to refer further to your letter of August 17, 1935, requesting my opinion as to the citizenship of Mr. Charles R. de Sales who has applied for a certificate of derivative citizenship under Section 33 of the Act of June 29, 1906, as amended by the Acts of March 2, 1929, May 25, 1932, and April 19, 1934 (34 Stat. 596; 45 Stat. 1512, 1515; 47 Stat. 165, 166; 48 Stat. 597; U. S. C., Title 8, Sec. 399c), which reads, in part, as follows:

"Any individual over twenty-one years of age who claims to have derived United States citizenship through the naturalization of a parent, or a husband, may, upon the payment of a fee of $5, make application to the Commissioner of Naturalization, accompanied by two photographs of the applicant, for a certificate of citizenship. Upon proof to

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the satisfaction of the commissioner that the applicant is a citizen and that the alleged citizenship was derived as claimed, and upon taking and subscribing to, before a designated representative of the Bureau of Naturalization within the United States, the oath of allegiance required by the naturalization laws of a petitioner for citizenship, such individual shall be furnished a certificate of citizenship by the commissioner, but only if such individual is at the time within the United States. In all courts, tribunals, and public offices of the United States, at home and abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States, the certificate of citizenship issued under this section shall have the same effect as a certificate of citizenship issued by a court having naturalization jurisdiction."

Mr. de Sales was born in Germany of German parents on January 25, 1902. His father, Michel Langbauer, died when the child was quite young and thereafter his mother, Anna Langbauer, with the child in her custody took up residence with a friend, Mrs. Regina A. de Sales, an American citizen, then in Europe. In 1914 Mrs. Langbauer and the child came to the United States with Mrs. de Sales and established their permanent residence with her in New York City. In 1915 the child was adopted by Mrs. de Sales under the laws of New York. In 1921, when the child was 19 years of age and still residing in New York, Mrs. Langbauer was admitted to citizenship under the naturalization laws in a proceeding before the Supreme Court, New York County. Mr. de Sales was married to a citizen of the United States in 1931.

The foregoing facts are indicated by documents submitted to me by your Department and by the Department of State. It is also stated in a memorandum which accompanied your letter that when Mrs. de Sales, Mrs. Langbauer, and the child came to the United States in 1914, the latter's name was included in Mrs. de Sales' passport as the result of a mistaken assumption by a consular officer that the child was hers and that consequently the immigration records evidence the child's admission as the child of a citizen of the United States. It is further stated that "to remedy that bona fide mistake, the order of the Board of Review recommends that

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the immigration record be amended to show that Mr. de Sales was admitted as an alien in 1914." It is, of course, primarily within the province of your Department to determine the question of the regularity of Mr. de Sales' admission and to correct your records so as to show the true facts; and, under the circumstances, I have no occasion to deal further with this phase of the matter.

Mr. de Sales claims American citizenship by virtue of the naturalization of his mother, Mrs. Langbauer. It is urged in his behalf that the case "falls wholly within" the provisions of Section 5 of the Act of March 2, 1907, c. 2534, 34 Stat. 1228, 1229 (U. S. C., Title 8, Sec. 8), "and also within" the provisions of Section 2172 R. S., which originated in the Act of April 14, 1802, c. 28, 2 Stat. 153, 155 (U. S. C., Title 8, Sec. 7). Both sections are copied below:

Section 2172 R. S. "The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof * * *."

Section 5, Act March 2, 1907. "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States." (34 Stat. 1229.)

As pointed out in my opinion of June 17, 1935, to the Secretary of State, it has heretofore been judicially decided that each of the foregoing sections is effective; that the section first quoted applies to foreign-born minor children dwelling in the United States at the time of the naturalization of the parent; and that the other section applies to such children who are absent from the United States when the parent is naturalized but afterwards come to the United States during their minority and establish permanent resi-

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dence. *United States* v. *Tod*, 297 Fed. 385, 392. Therefore, the applicant's claim to American citizenship depends upon the proper interpretation of Section 2172, although it is not apparent that a different conclusion would be required if the 1907 statute were regarded as applicable.

In the opinion of June 17, 1935 (38 Op. 217), I concluded that both of these sections provided for derivative citizenship of minor children consequent upon the naturalization of their natural parents and the satisfaction of the statutory residence requirements—that neither was to be construed as providing for derivative citizenship of adopted children consequent upon the naturalization of their adoptive parents. These conclusions were based upon the consideration that modern adoptions of minor children were unknown, and therefore not contemplated by the Congress, at the time of the passage of the Act of April 14, 1802; that the words of this statute did not acquire a broader meaning (as including adopted children, etc.) from their subsequent inclusion in the Revised Statutes, nor because many years after the original enactment local statutes, passed from time to time, have provided for the adoption of children; and that neither the language of the 1907 statute nor a consideration of the purpose apparently sought to be accomplished through its enactment warranted attributing to the words "parent" and "child," as used therein, a meaning sufficiently broad to include an adoptive parent and an adopted child.

The reasoning of that opinion leads to the conclusion that the Congress, not only did not provide for derivative citizenship of adopted children (upon the naturalization of their adoptive parents), but did not recognize adoptions at all or accord them any effect in citizenship matters. It is unnecessary, however, to base the conclusion in this case solely upon the reasoning employed in that opinion.

Local adoption statutes—which are by no means uniform—are primarily purposed to bring about the creation of new relationships, but with necessary, incidental effect upon those which already exist. They do not, and they cannot, obliterate the actual physical fact of paternity or maternity. Considering only what is effaced or removed, as distinguished from that which is created, modern adoption accomplishes only results long known in the law and

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flowing equally from other possible happenings in the life of a minor. Thus, adoption destroys the right of the natural parent to the custody, control, services and earnings of his child and relieves him of any legal duty to support, educate and otherwise provide for the child; but all these results follow upon attainment of majority by the child (dependent upon local statutes) and may, wholly or in varying degrees, follow upon earlier marriage, emancipation, apprenticeship, maritime service, conscription or enlistment in the armed forces, the commitment of the child to legal custody, guardianship, etc.

The Congress, of course, knew of these possibilities—some with effect equal to adoptions in destroying both customary and legalistic relationships of parent and minor child—but it did not expressly provide for them and I cannot read the statute as excluding all individuals so affected from the status of "child," as the word is used in the Federal statute. I cannot say, for instance, that a female of eighteen years would not have acquired citizenship under the Act of April 14. 1802, through the naturalization of her parent if living in Vermont because she there attained her majority at eighteen (Vt. Const., 1786, Art. I; *Sparhawk et al.* v. *Administrator of Ozias Buell et al.*, 9 Vt. 41, 78), when the Federal statute applies to children under twenty-one years of age without exception. Furthermore, the giving of a child for adoption by another may be likened to the giving of a child in marriage, and the legal effects upon existing relations are very much the same; yet both your Department and the Department of State, as I have been informed upon inquiry, take the position that marriage of a minor does not affect the operation of the statute as conferring derivative citizenship upon the subsequent naturalization of the parent, and I have been referred to an unreported decision of a Federal District Court in which the question was raised and the departmental view sustained.

The conclusions are required that the Congress spoke of children in the natural sense without regard to the existence or nonexistence in particular cases of the ordinary legal incidents of the relationship of parent and minor child; that the existing naturalization statutes do not recognize

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adoption; and that, on the other hand, these statutes do require us to look to the natural parents of adopted children in citizenship matters. For example, some peoples are ineligible for citizenship under our laws because of a race or nationality regarded as non-assimilable, and it is inescapable that eligibility in this respect is to be determined in a given case by looking to the parents from whom the individual is descended, not the person or persons who may have adopted him.

It is therefore my opinion that the applicant is a citizen of the United States by virtue of the naturalization of his mother, during his minority, when both he and his mother were living within the United States, notwithstanding that he had previously been adopted by another.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF LABOR.

ISSUANCE OF PATENTS TO GOVERNMENT EMPLOYEES

In order that an application for a patent may be received and a patent granted, without payment of fees, under the Act of March 3, 1883, c. 143, 22 Stat. 603, as amended by the Act of April 30, 1928, c. 640, 45 Stat. 467, the invention covered by the application must have been made by an "officer, enlisted man, or employee of the Government, except officers and employees of the Patent Office."

Each applicant for a patent must be in the service of the United States and within one of the classes prescribed by the statute at the time the application for a patent is filed, or the right to file an application accrues in cases covered by proper contracts.

The statutory waiver of fees is not affected by the fact that the applicant for a patent, after filing his application in due compliance with the statute, dies or leaves the service of the Government before the patent is actually granted.

The statute contemplates and authorizes an agreement by the inventor, while in the service of the United States, that the invention may be manufactured and used by or for the Government, if patented, without payment of royalty, and the consideration therefor is the right to file and prosecute an application for a patent without payment of fees.

Such an agreement may be carried out and the inventor permitted to file and prosecute an application for a patent without payment of fees, notwithstanding that his services with the Government may be discontinued prior to the actual filing of the application.

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Neither the letter nor the spirit of the law warrants any distinction based upon permanent or temporary status, or duration of service, so long as the individual is actually in the service of the United States when the invention is made and the necessary steps are taken to insure the application of the statute.

Eligibility under the statute is dependent upon service as an existing fact, and not upon past service or possible future service.

DEPARTMENT OF JUSTICE,
January 14, 1936.

SIR: Under date of July 31, 1935, you requested my opinion upon several questions propounded by the Commissioner of Patents and arising under the Act of March 3, 1883, c. 143, 22 Stat. 603, 625, as amended by the Act of April 30, 1928, c. 460, 45 Stat. 467 (U. S. C., Title 35, Sec. 45), which provides for the issuance of patents to officers, enlisted men and employees of the Government without the payment of any fee in the circumstances and upon the conditions stated in the statute. The questions are set forth as follows in the Commissioner's letter to you of July 8, 1935:

"Whether the Commissioner of Patents is authorized, under the Act of 1883, as amended, to grant a patent, without receipt of the regular fees, under each of the following conditions:

"When the inventor makes an invention while employed by the Government but does not file a patent application until after such employment has terminated?

"When the inventor makes an invention and files a patent application thereon while employed by the Government but thereafter leaves the government service prior to the issuance of the patent?

"When the inventor completes an invention prior to employment by the Government but does not file a patent application until after such employment commences?

"When an inventor who is not employed by the Government assigns his invention to a government employee * * *.

"With respect to joint inventors * * * [One or more of the joint inventors being without government connection.]

"With respect to the application of the Act of 1883, as amended, to persons other than those regularly employed in government service, it is questioned whether, within the meaning of the said Act, the following classes of persons are

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entitled to the grant of letters patent without payment of the regular patent fees: * * * [Personnel of the Army, Navy and Marine Reserves and National Guard; individuals on furlough without pay, or retired; special assistants and temporary employees.]"

I have found it necessary to examine both the original Act and the statute as amended and reenacted on April 30, 1928, and both are copied below for ready reference:

THE ORIGINAL STATUTE

"The Secretary of the Interior and the Commissioner of Patents are authorized to grant any officer of the government, except officers and employees of the Patent Office, a patent for any invention of the classes mentioned in section forty eight hundred and eighty six of the Revised Statutes, when such invention is used or to be used in the public service, without the payment of any fee: *Provided*, That the applicant in his application shall state that the invention described therein, if patented, may be used by the government or any of its officers or employees in the prosecution of work for the government, or by any other person in the United States, without the payment to him of any royalty thereon, which stipulation shall be included in the patent." (22 Stat. 625.)

THE AMENDED STATUTE

"The Commissioner of Patents is authorized to grant, subject to existing law, to any officer, enlisted man, or employee of the Government, except officers and employees of the Patent Office, a patent for any invention of the classes mentioned in section 4886 of the Revised Statutes, without the payment of any fee when the head of the department or independent bureau certifies such invention is used or liable to be used in the public interest: *Provided*, That the applicant in his application shall state that the invention described therein, if patented, may be manufactured and used by or for the Government for governmental purposes without the payment to him of any royalty thereon, which stipulation shall be included in the patent." (45 Stat. 467.)

Although this legislation has been in effect for more than half a century, it appears that resort to it was formerly much less frequent than in late years, and that prior to the

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time of the amendment of April 30, 1928, there was no uniform and long-continued practice which would bear upon the questions now submitted to me. The Commissioner of Patents states that in recent years the practice has been more nearly uniform, although conflicting in some particulars with earlier administrative rulings.

The Attorney General had occasion to consider the original statute in an opinion of March 22, 1920 (32 Op. 145), rendered upon a request from the Secretary of War, who stated: "There are * * * many cases in which employees of the Government have declined to make applications for patents under this statute because of the doubt as to its proper interpretation and the possibility of a dedication of the invention to the public." The Attorney General concluded that the filing of an application under the statute did not effect a dedication to the public.

This, however, did not set the matter at rest; and the Secretary of War, in a letter to the Chairman of the Senate Committee on Patents under date of November 17, 1927, declared that "so far as the War Department is concerned * * * the Act in question has fallen into disuse except in certain isolated cases where the invention in question has obviously no commercial value." (S. Rept. 765, 70th Cong.) He recommended clarifying legislation and, pursuant to his recommendation, a bill (which became the Act of April 30, 1928) was reported with the following explanation:

"The object of the bill is to protect the interests of the Government, primarily by securing patents on inventions made by officers and employees presently useful in the interest of the national defense or those which may prove useful in the interest of national defense in the future; and secondarily, to encourage the patenting of inventions by officers and employees of the Government with the view to future protection of the Government against suits for infringement of patents.

"At the present time there are a large number of suits for infringement of patents pending in the Court of Claims in which the amount claimed is something over $600,000,000. It is well known by the departments that in a number of instances the inventions involved in these suits were made by Government employees, but for one reason or another

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were not patented, and it is the purpose of this bill to clarify the language of the old bill in such a manner as to lend encouragement to officers and employees to patent their inventions with the assurance that they will have the benefit of any commercial rights which may arise, and at the same time protect the interests of the Government."

In the opinion of March 22, 1920, the Attorney General stated that "diligent search of the records of Congress in an effort to find some expression of the intent of this Act in records of debate or minutes of committee has been unavailing." The records show only that the paragraph was included in the 1883 statute (an Appropriation Act) as passed by the House of Representatives, was objected to and eliminated by the Senate, but was restored in conference, without debate or explanation. However, the limitations of the legislation, when analyzed and viewed in the light of the principles of the general law applicable to inventions by Government employees, fairly indicate the probable purpose intended to be accomplished, and the resulting deductions, as hereinafter indicated, accord with views prevailing and explanations made in connection with the passage of the 1928 amendment.

It is obvious that the Congress was not moved by mere purpose to grant a privilege to persons in the employ of the Government, for the statute authorized waiver of fees only in cases of inventions "used or to be used in the public service;" and, on the other hand, it is equally obvious that the Congress did not have in mind merely the acquisition from patentees indiscriminately of rights in inventions usable in the public service because so broad a purpose would not accord with the express limitation to persons in the employ of the Government. In fact, a suggestion that it would be in the public interest to extend the application of the legislation to all citizens of the United States making inventions usable by the Government was rejected by the House Committee on Patents in connection with the 1928 amendment. (Hearings, January 27, 1928.)

The limitation of the statute to inventions made by persons in the service of the Government and used, or to be used, in the public service is understandable. It not infrequently happens that officers and employees in the course

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of their employment detect insufficiencies, or inefficiencies, in means and methods used and conceive ideas for improvements, sometimes resulting in patentable invention. If the circumstances are such that the employee can be held to have made the invention as a part of his duties the entire beneficial interest belongs to the United States. *Solomons* v. *United States*, 137 U. S. 342, 346; *Houghton* v. *United States*, 23 F. (2d) 386, 390. In a large class of cases, however, the rule is inapplicable; the invention, although conceived with relation to public use, is the private property of the employee.

The foregoing considerations, in substance, were urged upon the Congress by a representative of the War Department as warranting the revivifying amendment in 1928. He expressly pointed out the fact, which I have hereinbefore indicated, that some inventions made by Government employees belong to the Government under the principle dealt with in *Solomons* v. *United States* but that there is another class of cases in which, as the Supreme Court said, "An employee, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property." The witness stated that "we want to get a license" in cases falling within the latter class thus indicated. (Hearings, *supra.*) It will be observed that this conclusion of the witness, speaking in behalf of the Secretary of War, who advocated the amendment, coincides with the conclusion which I have reached upon consideration of the language of the statute and the principles of the general law.

I regard it, therefore, as reasonably clear that the legislation was intended primarily to provide for the acquisition by the United States of rights in inventions made by persons in the service of the United States, while in such service and under circumstances in which the invention is to be regarded as the property of the employee, rather than of the United States, under the rule laid down by the courts; and ambiguities in the statute must be so resolved, to the extent reasonably possible, as to effectuate the indicated intention of the Congress.

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The Act authorizes the *granting of a patent* without payment of any fee, but also mentions the *application*, and thus recognizes the fact that patents are issued only upon applications previously made, and fees (now $30 plus $1 for each claim in excess of twenty) are chargeable both on the filing of the application and on the issuing of the patent. (U. S. C., Title 35, Secs. 33, 36, 78.) There has been no suggestion of doubt that the Act waives both fees if the inventor is in the Government service at the time of the filing of the application and also at the time of the issuance of the patent. The uncertainty in this connection has arisen in cases where the inventor is in the service of the Government when one fee is payable but is not in such service when the other fee is payable.

The statute provides, as a condition of the waiver of fees, that the applicant shall state in his application that the Government may use the invention, "if patented", thus also recognizing the obvious fact that there may be applications in cases where no patent will be granted because the invention is not patentable; and, furthermore, it makes the application or non-application of the statute dependent upon the insertion of the required stipulation for Government use in the application for the patent (assuming, of course, that there is also the necessary certification by the head of the department or bureau that the invention is used or liable to be used in the public interest).

Therefore, while the statute, in terms, authorizes the *granting of patents*, it really contemplates *applications for patents* which may or may not result in the actual granting of a patent, and must contemplate the meeting of all requirements at the time the application is made, not only with respect to the applicant's agreement and the certification by the head of the department or independent bureau, but also with respect to the status of the applicant, determinative of his right to proceed under the statute.

In the light of the foregoing, and with such additional observations as appear pertinent, I answer the questions submitted by you as follows:

(1) In order that an application for a patent may be received and a patent granted, without payment of fees. the invention covered by the application must have been made

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by an "officer, enlisted man, or employee of the Government, except officers and employees of the Patent Office." It would make subterfuge possible and violate the spirit of the Act to accord the statutory benefits with respect to inventions in which Government employees have acquired rights merely by contract with inventors not in the service of the United States.

(2) Each applicant for a patent must be in the service of the United States and within one of the classes prescribed by the statute at the time the application for a patent is filed, or the right to file an application accrues in cases such as hereinafter indicated.

(3) The statutory waiver of fees is not affected by the fact that the employee, after filing his application in due compliance with the statute, dies or leaves the service of the Government before the patent is actually granted. The statute is to be understood as waiving the fees upon applications by persons whose eligibility and consequent rights and burdens are fixed as of the time of the application. The legislation being purposed to further the acquisition by the Government of rights in desirable inventions made by employees, it would be an anomaly if an employee might accept the Government's offer, file his application without payment of fee, perhaps permit it to be prosecuted at Government expense (a common practice and a necessary one, if any patent is to be obtained, in cases where the employee perceives no pecuniary benefit to be had through commercial exploitation), and then defeat both the fulfillment of his contractual obligation and the accomplishment of the statutory purpose by leaving the service before the patent is issued.

The view has been advanced that the employee is bound by his stipulation, unless released by the Government, but must pay the final fee before the patent can issue. It would, however, be unduly harsh and conflict with the ordinary presumptions in contract matters to hold the employee bound by his undertaking and, yet, deny him the full consideration for which the stipulation was made, particularly if his leaving the Government service came about through dismissal. Also, of course, the former employee (or his personal representative, if deceased) would not pay the final fee, and would have no interest in doing so, in cases such as

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those mentioned by the Secretary of War, in which the invention has no commercial value and the Government alone is interested.

(4) As I have indicated, the eligibility of an applicant for a patent to proceed without payment of fees is ordinarily to be determined as of the time of the application. However, an application for a patent covering a complex invention is a highly technical document, requiring time and care in its preparation. It sometimes happens that an employee just about to leave the service will disclose an invention which he has made during his employment, perhaps wholly or partly during his normal hours of duty, and as a result of opportunities afforded by his employment—with resultant equities in favor of the Government recognized and admitted by the employee, although the circumstances and provable facts are not quite sufficient to bring the case within the rule that the invention is the sole property of the United States—and the employee consents that the United States may have the rights provided by the Act of March 3, 1883, as amended. If the matter is a simple one and an application can be filed at once there can be no question—but it is unthinkable that the public interest, and the purpose of the legislation, must be defeated because of inability to prepare and file an application for a patent before the employee leaves the service.

In such a case it may fairly be said that everything of substance contemplated by the statute has been accomplished—the employee has made and disclosed the invention, has consented to its use by the United States, and the head of the department or bureau concerned has determined that the invention is "used or liable to be used in the public interest." His agreement that the United States may use the invention is an authorized contractual undertaking contemplated by the Act of March 3, 1883, as amended—for a meeting of the minds necessarily precedes the filing of the application under the statute—and the consideration therefor is the statutory permission to file the application and to obtain a patent, if the invention is found patentable, without payment of fees.

I have in mind, of course, an actual, provable agreement that the United States may use the invention; but if both the employee and the United States, through its authorized

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representatives, concede the existence of the agreement and no other parties are concerned, the agreement may ordinarily be taken as established. Nevertheless, the agreement ought to be reduced to writing. It ought to provide clearly that the invention (described as accurately as the exigencies permit) may be manufactured and used by or for the Government for governmental purposes, if patented, without payment of royalty; that the head of the Department or bureau has determined and has certified, or will certify, that the invention is used or liable to be used in the public interest; and that an application for a patent is to be prepared and filed under the Act of March 3, 1883, as amended by the Act of April 30, 1928, with such other detail as the circumstances warrant.

As I have hereinbefore indicated, the statute necessarily contemplates such an agreement, such a meeting of the minds, for it cannot be supposed that the head of the Department is to make the determination and certification blindly—an idle thing unless the employee is willing to enter into the arrangement—and, on the other hand, it cannot be supposed that the employee is to file an application containing an unqualified stipulation for use of the invention by the Government, if patented, without some understanding that the required certification will be made and that he will receive the consideration which the statute provides.

We have, then, an authorized agreement by the employee that the United States may use his invention, if patented, and a promise by the United States, which is the consideration for his agreement, that he may file and prosecute his application for a patent without payment of fees. The statute does not provide that the validity of the undertaking or its due performance shall depend upon the retention of the employee in the service until the application can be prepared and filed—contrary to the public interest in some cases and at great inconvenience to the employee in others. I must conclude that the individual who has made such an agreement remains subject to removal and, likewise, free to tender his resignation, or to leave at the end of his enlistment period, etc., yet I cannot conclude that the discontinuance of his official connection, with the effect of removing him from the status of an "officer, enlisted man, or employee" before

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the application can be prepared, must have the effect of vitiating his contract concerning the invention.

It is, therefore, my opinion that an agreement such as I have indicated may be carried out and the inventor permitted to file and prosecute his application without payment of fees notwithstanding that his services with the Government may be discontinued prior to the actual filing of the application.

I have considered a suggestion that it might come within the spirit of the statute to permit the filing of an application under the Act of March 3, 1883, as amended, by a former employee upon the mere showing and certification that his invention, used or liable to be used in the public interest, had been made during his prior service with the United States. If it be conceded that this would come within the spirit of the law, that, however, is not in itself sufficient. We may look to the apparent purpose in order to explain and qualify words actually used, but we cannot go beyond this and add to the statute words which are not therein contained. The statute refers clearly to officers, enlisted men and employees and, while it appears reasonable to fix the status of an individual as of a time during his service when the statute was invoked and the procedural machinery set in motion, I think it would be going beyond justifiable limits to construe the words "officer, enlisted man, or employee" as including all former officers, enlisted men and employees. If an employee has made an invention which belongs to him as his own property under the rules laid down by the courts, and has left the service without agreeing to its use by the Government, either he has not offered the invention to the Government, and thus has rejected the statute (expressly or impliedly), or he has offered the invention and his offer has been rejected. In either case the matter may be regarded as definitely closed, and I perceive no reason why it should thereafter be reopened when the inventor has, perhaps long since, ceased to be of the class of persons to whom the statute is applicable.

(5) With respect to the questions concerning the eligibility under the statute of particular employees and classes of employees, neither the letter nor the spirit of the law warrants any distinction based upon permanent or temporary status, or duration of service, so long as the individual is

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actually in the service of the United States when the invention is made and the necessary steps are taken to insure the application of the statute. Eligibility is dependent upon service as an existing fact, and not upon past service or possible future service.

Beyond the foregoing I cannot properly advise you except in particular cases as they arise and upon consideration of all pertinent facts, including information as to the actual duty status of the inventor when making his invention and when applying for the patent. Furthermore, in cases of doubt the head of the department or bureau making the required determination and certification should consider carefully the questions involved, bearing in mind the object of the statute to further a definite public purpose, not merely to extend the Patent Office facilities gratuitously to a particular group of citizens covering inventions that may have little or no relation to actual public service. In the consideration of any specific cases, if submitted to me, I should wish to have the views of the head of the department or bureau concerned as well as a copy of the opinion of his chief law officer, and, of course, the views entertained in your department.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF COMMERCE.

AUTHORITY OF THE SECRETARY OF COMMERCE TO ESTABLISH LOAD LINES UNDER THE COASTWISE LOAD LINE ACT, 1935

It would seem that the Coastwise Load Line Act, 1935, does not authorize the Secretary of Commerce to establish load lines determined by the factor of stability of a vessel in a damaged condition, but limits him to establishing load lines based upon a vessel in an intact condition.

DEPARTMENT OF JUSTICE,
February 4, 1936.

SIR: In your letter of December 14, 1935, my opinion is requested on the question whether the Secretary of Commerce is authorized, under the Coastwise Load Line Act, 1935, approved August 27, 1935 (Public No. 354, 74th Con-

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gress), to establish load lines determined by the factor of stability of a vessel in a damaged condition, or whether he is limited to establishing load lines based upon a vessel in an intact condition. Your letter states that my opinion is desired in order that, should it be determined that the Act does not contain the authority to establish load lines based on the stability of vessels in a damaged condition, legislation containing such authority may be secured from the Congress.

Section 2 of the Coastwise Load Line Act, 1935, provides as follows:

"The Secretary of Commerce is hereby authorized and directed in respect of the vessels defined above to establish by regulations from time to time the load water lines and marks thereof indicating the maximum depth to which such vessels may safely be loaded and in establishing such load lines due consideration shall be given to, and differentials made for, the various types and character of vessels and the trades in which they are engaged: *Provided*, That the load-line provisions of this Act shall apply to the Great Lakes and that no load line shall be established or marked on any vessel which load line gives a lesser free-board and less buoyancy than the load line established by the International Treaty on Load Lines of 1930, and that the regulations established under this proviso shall have the force of law: *Provided further*, That in applying the load lines to vessels on the Great Lakes the Secretary of Commerce is vested with discretion to vary the load-line marks from those established by said Treaty when in his opinion the changes made by him will not be above the actual line of safety." (49 Stat. 888.)

Among the regulations which you propose to approve for establishing such load lines, under Section 2 of the Act is Regulation 5, to which your request for my opinion is directed, and which reads as follows:

"5. When determining the position of the load lines on passenger vessels, consideration will be given to the age of the vessel, its subdivision and the efficacy thereof and to the stability of the vessel in a damaged condition, and such increase made to the freebcard as circumstances indicate to be necessary. For these vessels the period of validity of the load line certificate shall be one year."

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The answer to the question submitted turns on the interpretation of the words "load lines" as used in the statute. Unless those words have come to have a settled and well-known meaning restricting their significance to the line above which a vessel in an intact condition may not be safely loaded, the Act would seem to confer upon the Secretary authority to prescribe for establishing load lines any regulation which is not arbitrary and has a reasonable bearing upon the safety of the vessel, her crew, passengers and cargo. If the words carry no such limited connotation, the Secretary is authorized to promulgate regulations to establish load lines determined by the factor of stability of a vessel in a damaged condition if that factor is capable of practical determination and application.

The legislative history of the Act, while indicating that the general purpose of it is the insurance of greater safety of life and property at sea, affords no light respecting what factors are intended to be considered in determining load lines; nor does the legislative history of the Load Line Act of March 2, 1929 (45 Stat. 1492), which, providing for establishing load lines for vessels in foreign trade, was the standard for the Coastwise Load Line Act, 1935. In my opinion, however, there are weighty extraneous considerations which indicate that the words "load lines" are used in the Act of 1935, with reference to vessels in an intact condition.

In the first place, the Secretary has very broad authority to promulgate regulations respecting the seaworthiness of vessels (U. S. C., Title 46, Secs. 375, 391), and regulations extensive in scope in fact have been established thereunder by the Board of Supervising Inspectors and approved by the Secretary of Commerce (See "General Rules and Regulations Prescribed by the Board of Supervising Inspectors Ocean and Coastwise," issued March 2, 1931, by the Steamboat Inspection Service, U. S. Department of Commerce). Before a vessel can sail she must have complied with all of the requirements for seaworthiness and have a certificate to that effect. The language of the Coastwise Load Line Act, 1935, like that of the Load Line Act of March 2, 1929, provides that the load water lines and marks shall be the

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maximum depth to which vessels shall be loaded; and, in view of the extensive regulations respecting seaworthiness, this language reasonably may contemplate merely the depth to which a vessel in undamaged and seaworthy condition may be loaded on sailing. In the second place, this construction is fortified by the fact that the regulations established by the Secretary under the practically identical provisions of the Load Line Act of March 2, 1929, contemplate determination of load lines only with respect to vessels in undamaged condition, and do not include the factor of stability thereof in damaged condition. In the third place, such connotation is strengthened and such practice under the 1929 Act is corroborated by the statement in the memorandum to you from the Solicitor of your Department (copy of which accompanied your letter) that: "Furthermore, usage would seem to indicate that load lines are accepted as the indication of the maximum loading depth of an intact vessel. Conversations with engineers and texts on the subject disclose that in determining load lines the factor of stability in damaged condition is not considered;" from which, among other things, he draws the conclusion that: "It would seem a safe conclusion, therefore, that 'load line' has come to be a term of art having a meaning that would exclude the factor of under water damage." It here may be noted, also, that the overloading problems which were considered by the Federal courts in *The Vestris*, 60 Fed. (2) 273, and *The Indien*, 71 Fed. (2) 759–762, wherein the disasters involved happened prior to the passage of the Load Line Act of March 2, 1929, related to the vessels in undamaged condition.

In addition to the above considerations, the limited interpretation of the words used in the Coastwise Load Line Act, 1935, is argued by the fact that the International Load Line Convention, held in London in 1930, which was ratified by the United States on February 27, 1931 (47 Stat. 2228, 2367), and the International Convention for the Safety of Life at Sea, held in London in 1929, which the Delegates of the United States approved but which has not been ratified by this Government, both seem to have dealt with the determination of load lines on the basis of vessels in undamaged

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condition. The terms of these two Conventions are substantially reported in Halsbury's Laws of England, Continuation Volume 1932, the former at pp. 661–676, the latter at pp. 679–736. Treaty Information, September 30, 1930, Supplement to Bulletin No. 12, Publications of the Department of State, p. 24, states under the heading "Conditions of Assignment of Load Lines" that "The assignment of load lines is conditional upon the ship being structurally efficient and upon the provision of effective protection of ship and crew." The regulation in the United States Load Line Act of 1930 (U. S. C., c. 2–A, Title 46, Sec. 85) is similar, and the regulations issued by the Secretary under that Act are practically identical with those in Annex 1 of the Convention (See Treaty Information, *supra*, pp. 21–60; Regulations of the Department of Commerce Effective September 2, 1930, pp. 3, 10–43, as supplemented by the Secretary's General Letter 320 of December 22, 1932).

While perhaps from the broad purpose of the Coastwise Load Line Act, 1935, to insure greater safety of life and property at sea it may be argued that no limitation was intended in the use of the words "load lines", nevertheless, because of the counter-balancing considerations which have been noted above, I am of the opinion that, at best, it is uncertain whether the authority of the Secretary to establish load lines determined by the factor of stability of vessels in damaged condition would be judicially sustained. For that reason, if that factor is intended to be employed by the Secretary in promulgating regulations under the Coastwise Load Line Act, 1935, it would seem desirable to obtain legislative authority specifically authorizing the use of that factor.

Concerning the technical, nautical, engineering question adverted to by the Solicitor of your Department, whether the factor of the stability of vessels in damaged condition is capable of practical determination or application, I express no opinion.

Respectfully yours,

HOMER CUMMINGS.

To the SECRETARY OF COMMERCE.

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APPLICABILITY OF CERTAIN ACTS TO CONSTRUCTION, ALTERATION, AND REPAIR OF COAST GUARD VESSELS, BOATS, AND AIRCRAFT

Contracts in excess of $2,000 for alteration or repair of U. S. Coast Guard vessels, boats, and aircraft, and contracts in excess of that amount for construction of such craft that provide for the transfer of title to the United States during the progress of the work as part payments are made, are subject to the provisions of Public Acts No. 321 (superseding the Heard Act), No. 402 (the Bituminous Coal Conservation Act of 1935), and No. 403 (amending the Davis-Bacon Act) of the 74th Congress, provided, however, that as to the last-mentioned statute the work under the contract is to be performed at a site or place known to the Government department or agency inviting bids at the time specifications for the contract involved are advertised.

The meaning of the terms "public work" and "public works", as used in the above-named statutes, considered.

DEPARTMENT OF JUSTICE,
March 6, 1936.

SIR: Reference is made to your letter of November 9, 1935, in which you request my opinion respecting whether Public Acts Nos. 321, 402, and 403 of the 74th Congress, the first two relating to "public work" and the third to "public works", are applicable to construction, alteration, or repair of United States Coast Guard vessels, boats, and aircraft. Since your letter stated that the answers to these questions would seem to affect the Navy Department and the Department of Labor, as well as your own Department, I have obtained and considered the views of such other Departments in accordance with your suggestion.

1. Public Act No. 321 (49 Stat. 793), approved August 24, 1935, repealed the so-called Heard Act of August 13, 1894 (28 Stat. 278) as amended (U. S. C., Title 40, Sec. 270), which required any person "entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work," before commencing such work, to execute the usual penal bond for performance, "with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for

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in such contract," and conferred upon anyone furnishing labor or materials for which payment was not made the right to intervene and be made a party to any action instituted by the United States on the bond and to have their claims adjudicated therein. It was in recognition of the inability of contractors for labor and material to take liens upon the public property of the United States that Congress passed the Heard Act; and in view of its purpose to provide protection for them, the statute has been given liberal construction by the Supreme Court. *U. S.* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452, 471.

Public Act No. 321 supersedes the Heard Act and, its purpose being the same, likewise is to be given liberal construction. In lieu of the combination performance and payment bond specified in the Heard Act, the new Act requires two bonds, one for the protection of the United States against default of the contractor in performance, and another for the protection of persons supplying labor and material in the prosecution of the work; and in certain respects it liberalizes the remedies available under the latter bond to persons supplying labor and materials to the contractor. The language of the new Act respecting the subject matter of the contracts under which the last mentioned bonds are required differs slightly from the language quoted above from the Heard Act and is as follows:

"That (a) before any contract, exceeding 2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor' ":

The answer to the question which you present with respect to this Act depends upon whether the contracts to which you refer are "for the construction, alteration or repair of any * * * public work of the United States."

The meaning of the words 'any public work" as they are used in the Heard Act has been judicially determined; and no reason appears for giving the same words as used in the superseding act any different meaning. The Supreme Court in *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U. S.

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24, an action upon a bond given to the United States as required by the Heard Act, held that the construction of a vessel for the United States, under a contract providing for partial payments as labor and material furnished equalled certain percentages of the total contract price and that "the portion of the vessel completed and paid for under said method of partial payments shall become the property of the United States," was the construction of a "public work" within the Act. Under that case the criterion determining whether a work is public or not under the Heard Act is not whether it is attached to the soil, but whether it belongs to a representative of the public. Mr. Justice Holmes there said (p. 33):

"Of course public works usually are of a permanent nature and that fact leads to a certain degree of association between the notio nof permanence and the phrase. But the association is only empirical, not one of logic. Whether a work is public or not does not depend upon its being attached to the soil; if it belongs to the representative of the public it is public, and we do not think that the arbitrary association that we have mentioned amounts to a coalescence of the more limited idea with speech, so absolute that we are bound to read 'any public work' as confined to work on land."

This test has recently been applied by the Circuit Court of Appeals for the Second Circuit in *United States, for Use of Mengel Body Co.* v. *Metropolitan Body Co.*, 79 F. (2d) 177, holding a contract for the construction of mail truck bodies which remained at the risk of the contractor and did not become property of the United States until accepted by the Government not to be for a "public work" within the meaning of the Heard Act. The court there said (p. 178):

"Granting that the bodies were a 'work' while work was being done upon them, the test laid down in *Title Guaranty & Trust Co.* v. *Crane Co.*, *supra*, made them a private work during that period. In this respect they differed from other property the government might buy only in that they were made to special order. This is in accord also with the rationale of the decision in *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works* (C. C. A.) 163 F. 168, where

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title during the progress of the work was recognized as the decisive feature."

For these reasons, in my opinion, contracts exceeding $2,000 in amount, for alteration or repair of United States Coast Guard vessels, boats and aircraft, since the property to be altered or repaired belongs to the United States, fall within the category "any public * * * work of the United States" as those words are used in Public Act No. 321 and are subject to the provisions of that Act. Likewise, such contracts for construction of those craft as provide for passage of title to the United States during the progress of the work as partial payments are made, are subject to the provisions of the Act, where the contract exceeds $2,000 in amount.

2. Public Act No. 402 (49 Stat. 991), known as the Bituminous Coal Conservation Act of 1935, provides in part (Part III, Sec. 14) as follows:

"(b) Each contract made by the United States, or any department or agency thereof, with a contractor for any public work, or service, shall contain a provision that the contractor will buy no bituminous coal to use on or in the carrying out of such contract from any producer except such producer be a member of the code set out in section 4 of this Act as certified to by the National Bituminous Coal Commission."

Taking into consideration the purposes of this Act, I see no reason why the words "any public work, or service," as used in it, should receive any different construction than that which has been reached above of the words "any * * * public work" as used in Public Act No. 321. Accordingly, for the reasons stated in discussing the applicability of Public Act No. 321, in my opinion, contracts for alteration or repair of United States Coast Guard vessels, boats and aircraft, and such contracts for construction thereof as provide for passage of title to the United States during the progress of the work as partial payments are made, are subject to the provisions of Public Act No. 402.

3. Public Act No. 403 (49 Stat. 1011), approved August 30, 1935, amends the so-called Davis-Bacon Act (46 Stat. 1494), as amended (U. S. C., Title 40, Sec. 276a), which required payment of prevailing rates of wages to laborers

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and mechanics employed in the performance of contracts in excess of $5,000 for the construction of public buildings of the United States. As amended, the Act is extended to include public works of the United States, as well as public buildings thereof, and provides in part as follows:

"That the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; * * *"

Prior to the amendment, the Davis-Bacon Act provided that any dispute with regard to prevailing wage rates which could not be adjusted by the contracting officers of the Government were to be referred to the Secretary of Labor for final determination. It will be noted that the amendment provides for predetermination of minimum wage rates by the Secretary of Labor.

It is to be noted that the words "public work" are used in Public Acts Nos. 321 and 402, whereas, the words in Public Act No. 403 are "public works". While the term "public works" has been defined as "all fixed works contracted for public use, as railways, docks, canals, waterworks, roads, etc.," Century Dictionary (34 Op. 257, 259), Attorney General Wickersham (29 Op. 395) on the authority of *Ellis* v. *United States*, 206 U. S. 246, and *Title Guaranty & Trust Co.* v. *Crane Co.*, *supra*, held, and in my opinion correctly, that the employment of laborers and mechanics in making repairs to Government vessels is employment upon a public work of the United States within the language

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"any of the public works of the United States" in the Eight Hour Law of August 1, 1892 (27 Stat. 340). In view of the obvious purpose of Public Act No. 403 to protect minimum wages to be paid to laborers and mechanics, it should not be given any narrower construction.

I, therefore, conclude that contracts in excess of $2,000 for alteration or repair of United States Coast Guard vessels, boats and aircraft, and such contracts for construction thereof as provided for passage of title to the United States during the progress of the work as partial payments are made, where the contract is in excess of $2,000, are subject to the provisions of Public Act No. 403—provided, however, that the work under the contract is to be performed at a particular site or place the location of which is known to the government department or agency inviting bids at the time specifications for the contract involved are advertised.

Plainly this qualification is implicit in the statute and is necessary because the local prevailing wage principle which the Act embodies can apply only to such classes of public works as have a locality which is known to the contracting agency at the time invitations for bids for contracts for the work as published. The Act requires "that the advertised specifications * * * shall contain a provision stating the minimum wages to be paid" and that the Secretary of Labor is to determine such wages upon the basis of those "prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work *in the city, town, village, or other civil subdivision of the State in which the work is to be performed* (italics supplied)." Obviously this language connotes a situs at which the work is to be performed known when the specifications are advertised. To construe the statute as requiring inclusion in the specifications of a wage scale based upon wages prevailing at a particular place or site the location of which is unknown at the time of advertisement would lead to an absurd consequence. As stated by Attorney General Stone (34 Op. 257, 261) quoting from *United States* v. *Kirby*, 7 Wall. 482, 486:

"All laws should receive a sensible construction. General terms should be so limited in their application as not

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to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

APPLICABILITY OF THE ACT OF AUGUST 24, 1935, 49 STAT. 793, TO CERTAIN CONTRACTS FOR REMAKING COTTON MATTRESSES, ETC.

The conclusions reached in the opinion of this date to the Secretary of the Treasury with respect to the applicability of the Act of August 24, 1935, 49 Stat. 793, and certain other Acts, to construction, alteration, and repair of U. S. Coast Guard vessels, boats, and aircraft, constitute the answer to the question whether the said Act of August 24, 1935, is applicable to contracts in excess of $2,000 for the remaking of cotton mattresses owned by the Government and the manufacture of uniforms from cloth owned by the Government, and other contracts of a similar nature.

DEPARTMENT OF JUSTICE,
March 6, 1936.

SIR: Reference is made to your letter of February 7, 1936, in which you advise me that the War Department has pending at the present time proposals to contract for remaking a quantity of cotton mattresses owned by the Government into mattresses of the inner spring type and also bids for the manufacture of uniforms from cloth owned by the Government, each contract involving a sum in excess of $2,000. You request my opinion as to the applicability of the Act of August 24, 1935, 49 Stat. 793, to such contracts and others of a similar nature.

I have just had occasion to render to the Secretary of the Treasury an opinion with respect to the applicability of that and other Acts to construction, alteration, and repair of United States Coast Guard vessels, boats, and aircraft. Since such craft are movable and personal property, as are the objects to which your inquiry is directed,

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the conclusions which I have reached in my opinion to the Secretary of the Treasury will constitute the answer to the question which you submitted to me. I am, therefore, enclosing a copy of my opinion to the Secretary of the Treasury (38 Op. 418), which I believe you will find sufficient for your purposes.

Respectfully,

STANLEY REED,
Acting Attorney General.

TO THE SECRETARY OF WAR.

RIGHT OF UNITED STATES TO EXCLUSIVE USE OF INVENTIONS OF GOVERNMENT EMPLOYEES COVERED BY PATENTS ASSIGNED TO THE GOVERNMENT

When an invention is made by a Government employee under such circumstances that the invention is the property of the United States, it is customary procedure to have the patent covering the invention issue to the United States, as represented by a designated officer, upon assignment executed by the employee, either before or after the application is filed.

It is an established practice for the United States to acquire and hold patents, and licenses under Government patents have heretofore been issued to private persons. The issuance of such licenses is consistent only with the view that there is no authority for private persons to use inventions covered by government-owned patents in the absence of a license.

If a proper case warranting such action should arise, the Government ought to undertake to maintain in the courts the exclusive right of the United States under a duly acquired patent.

DEPARTMENT OF JUSTICE,
March 9, 1936.

SIR: I have your letter of February 27 in which you ask for my opinion upon the following question, submitted by the Resettlement Administration:

"Where an invention is developed by a Government employee, specifically employed for the purpose, and Letters Patent thereon are obtained by him and are subsequently assigned by him to the Government, does such assignment constitute a dedication of the invention to the general public, or may the Government treat the invention as its exclusive (governmental) property and exclude the public from use of the same?"

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It is customary procedure in such a case to have the patent issue to the United States, as represented by a designated officer, usually the head of a department or independent establishment—the employee's assignment being executed either before or after the application for a patent is filed. This Department frequently has occasion to prepare and prosecute applications for patents in such cases, upon requests from the several departments and independent establishments, and its facilities are, of course, available to the Resettlement Administration.

It has been judicially determined that when an invention is made by a Government employee under such circumstances that it may be said that the making of the invention was part of his official duties the *invention* is the property of the United States. *Solomons* v. *United States*, 137 U. S. 342, 346; *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 187; *Houghton* v. *United States*, 23 F. (2d) 386, 390.

In *United States* v. *Dubilier Condenser Corp.*, the Court declared that "one employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any *patent* obtained." The case concerned inventions made by employees of the United States and there was no expressed qualification that the rule thus stated would not apply to any employee of the United States in a proper case—aside from such doubt as may be suggested by another paragraph inserted elsewhere in the court's opinion and subsequently eliminated as hereinafter indicated.

The holding was that the employee had not been "employed to make an invention" and that the United States obtained only "the so-called shop-right, which shortly stated, is that where a servant, during his hours of employment, working with his master's materials and appliances, conceives and perfects an invention for which he obtains a patent, he must accord his master a non-exclusive right to practice the invention."

In another part of the opinion—numbered "third" and dealing with the question of the existence of an implied agreement on the part of the employees to assign to the

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Government any patent obtained by them—there originally appeared the following paragraph:

"Moreover no court could, however clear the proof of such a contract, order the execution of an assignment. No act of Congress has been called to our attention authorizing the United States to take a patent or to hold one by assignment. No statutory authority exists for the transfer of a patent to any department or officer of the Government, or for the administration of patents, or the issuance of licenses on behalf of the United States. In these circumstances no public policy requires us to deprive the inventor of his exclusive rights as respects the general public and to lodge them in a dead hand incapable of turning the patent to account for the benefit of the public."

This paragraph was subsequently eliminated from the opinion upon suggestion and further showing by the United States (289 U. S. 706.)

It is an established practice for the United States to acquire and hold patents, and specific appropriations for the purchase of patents have been made by the Congress. For example, the Act of March 4, 1917, c. 180, 39 Stat. 1168, 1169, appropriated one million dollars "to enable the Secretary of War and the Secretary of the Navy to secure by purchase, condemnation, donation, or otherwise, such basic patent or patents as they may consider necessary to the manufacture and development of aircraft." Furthermore, it is provided in U. S. C., Title 35, Sec. 37, that "no application [for a patent] shall be regarded as abandoned which has become the property of the Government of the United States * * * ."

Attorney General Stone, in an opinion of October 28, 1924, (34 Op. 320, 328, 329) held that the Secretary of the Navy was authorized to grant a revocable, nonexclusive and nontransferable license to a private person to make, use and sell apparatus embodying inventions covered by patents owned by the United States, and in the opinion he referred to records of the Congress indicating that "numerous licenses" had theretofore been granted for the use of patented inventions owned by the Government. The issuance of such licenses is consistent only with the view that there is no

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authority for private persons to use inventions covered by government-owned patents in the absence of a license.

I am aware of no case in which the United States has had occasion to file a suit for an injunction or for damages arising out of an alleged infringement of a government-owned patent. In my opinion, should a proper case warranting such action arise, the Government should undertake to maintain in the courts the exclusive right of the United States under a duly acquired patent.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the PRESIDENT.

EFFECTIVE DATE OF INCREASED RATES OF DUTY ON CERTAIN FORMS OF TOBACCO IMPORTED FROM CUBA

The increased rates of duties prescribed in Schedule II of the Cuban Trade Agreement of September 3, 1934, will become effective immediately when the Secretary of Agriculture gives public notice that the cigar tobacco adjustment program in the United States has been abandoned or substantially abandoned.

The public notice referred to above is not an "administrative ruling" within the meaning of that term as used in Article XIII of the Cuban Trade Agreement.

DEPARTMENT OF JUSTICE,
March 12, 1936.

SIR: Reference is made to Acting Secretary Taylor's letter of February 25, 1936, in which he requests my opinion on the question whether, when the Secretary of Agriculture, pursuant to the note to Item 605 of Schedule II of the Cuban Trade Agreement of September 3, 1934, gives public notice that the cigar tobacco adjustment program in the United States has been abandoned or substantially abandoned, the increased rates of duty described in that Schedule will become effective immediately or upon the expiration of thirty days after publication of notice.

Item 605 of Schedule II of the Cuban Trade Agreement provides maximum rates of duties to be charged on certain forms of tobacco imported into the United States from Cuba, and the note to that Item places a limitation on the amount of tobacco which may be imported into the United

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States from Cuba during any calendar year. The last paragraph of the note to the Item provides as follows:

"If and when the Secretary of Agriculture of the United States gives public notice that the cigar tobacco adjustment program in the United States has been abandoned or substantially abandoned, the duties on tobacco and manufactures of tobacco imported into the United States from Cuba shall be determined as though such commodities were not enumerated and described in this Schedule; provided, however, that the rates of such duties shall not exceed those imposed on the day of the signature of this Agreement."

Article XIII of the Trade Agreement reads as follows:

"No administrative ruling by the United States of America or the Republic of Cuba effecting advances in duties or charges applicable under an established and uniform practice to imports from the territory of the other country shall be effective retroactively or with respect to articles either entered for or withdrawn for consumption prior to the expiration of thirty days after the date of publication of notice of such ruling in the usual official manner. The provisions of this Article do not apply to administrative orders imposing anti-dumping duties, nor relating to sanitation or public safety, nor giving effect to judicial decisions."

The answer to the question submitted turns upon whether the giving of the public notice prescribed in the above-quoted paragraph of the note to Item 605 is within the words "administrative ruling" in Article XIII of the Trade Agreement.

A "ruling" has been defined as a decision on a question of law. *Century Dictionary; Paine* v. *Newton St. Ry. Co.*, 192 Mass. 90; *State* v. *O'Brien*, 18 Mont. 1; *City Council of Anderson* v. *O'Donnell*, 29 S. C. 355, 365. The term "administrative ruling" ordinarily would seem to contemplate a decision by an administrative officer on a point of law. The giving of the public notice provided in the note to Item 605 does not involve a decision on a point of law—even if premised upon a prior administrative ruling. The last sentence of Article XIII, however, excepts from the operation of the Article several classes of "administrative orders," which may or may not involve decisions on points of law. Therefore, since certain administrative orders which may not

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fall within the usual meaning of the term "administrative ruling", are expressly excluded, it may be that this term as used in the article was intended to have a meaning somewhat broader than its usual connotation, and that all administrative orders except such as are expressly excluded were intended to be covered by it. This I find it unnecessary to determine.

Assuming, but not deciding, that the term "administrative ruling" as used in Article XIII is sufficiently broad to include "administrative orders," it does not follow that the term would include the "public *notice*" mentioned in the last paragraph of the note to Item 605. The word "order" means "authoritative direction; injunction; mandate; command, whether oral or written; instructions: as, to receive orders to march; to disobey orders;" *Century Dictionary; Roxford Knitting Co.*, v. *Moore & Tierney*, 265 Fed. 177, 191. "Notice" is quite a different concept. It signifies announcement of a past conclusion or event or of an event expected to take place in the future as distinguished from the conclusion or event itself. It may be defined generally as that which imparts information of the fact to the one to be notified. *Burdine* v. *White*, 173 Ky. 158. It is the legal instrumentality by which knowledge is conveyed. *Merrill* v. *Pacific Transfer Co.*, 131 Cal. 582. It includes any means whereby intelligence or knowledge is communicated. *People* v. *McKean*, 76 Cal. A. 114, 243 Pac. 898; *Century Dictionary*. Public notice is "a notice given to the public generally, or to the entire community, or to all whom it may concern." *Black's Law Dictionary*, Third Edition; *Pennsylvania Training School* v. *Independent Mutual F. Ins. Co.*, 127 Pa. 559. I find nothing in the note to Item 605 or elsewhere in the Trade Agreement which would indicate that the parties intended to use the term "public notice" in any other than its commonly accepted sense, and, of course, words are to be given their ordinary meaning unless it is repelled by the context.

For these reasons, I do not think that the public notice contemplated in the note to Item 605 is an "administrative ruling" even if it be assumed that such term as used in Article XIII is sufficiently broad to include administrative orders. I have to advise you, therefore, that in my opinion

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the increased rates of duties will become effective immediately when the Secretary of Agriculture gives public notice that the cigar tobacco adjustment program in the United States has been abandoned or substantially abandoned.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

AUTHORITY OF SECRETARY OF WAR TO GRANT THE SOUTHERN RAILWAY COMPANY AN EXTENSION OF TIME FOR ALTERING BRIDGE

Under date of September 20, 1929, the Secretary of War, pursuant to Section 18 of the Act of March 3, 1899, 30 Stat. 1153, issued an order requiring the Southern Railway Company to make certain alterations in its bridge over the Tombigbee River near Jackson, Alabama, within a specified time. Later, an extension of time was granted. The Railway Company having failed to make the prescribed alterations within the time specified in the order as extended, the Secretary, pursuant to the requirement of the statute, referred the matter to the Department of Justice; and subsequently the Railway Company was convicted under the statute, in a federal district court, of having willfully failed to comply with the Secretary's order, a fine of $1,000 being imposed. The Company appealed to the Circuit Court of Appeals and the appeal is now pending.

Held: The Secretary of War is without authority to grant the Railway Company an extension of time for making the alterations specified in the order.

DEPARTMENT OF JUSTICE,
March 21, 1936.

SIR: Reference is made to your letter of February 8, 1936, in which you request the opinion of the Attorney General upon the question hereinafter stated.

The material facts out of which your question arises are as follows:

Complaints having been received from navigation interests that the bridge of the Southern Railway Company over the Tombigbee River near Jackson, Alabama, was a menace to navigation, your predecessor, upon recommendation of the Chief of Engineers, authorized the District

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Engineer at Mobile, Alabama, to hold a public hearing in the matter. It was found from the hearing that the bridge was an unreasonable obstruction to the free navigation of the said River, and on September 20, 1929, the Secretary of War issued a notice to the Southern Railway Company requiring it to make certain specified alterations in the bridge to render such navigation reasonably free, easy, and unobstructed. The notice also prescribed that the alterations should be made and completed within two years and three months from the date of service thereof. Service of the notice on the Railway Company was effected on October 7, 1929.

The period prescribed for making the alterations expired on January 7, 1932. The Railway Company made no alterations during that period but requested an extension of time on the ground that it was not financially able to do the work within the time specified. For that reason, the Secretary of War, on January 8, 1932, extended the time for altering the bridge to January 7, 1933. No alterations were made during the period of extension.

In holding the hearing and notifying the Railway Company to make the alterations, the Secretary of War acted pursuant to section 18 of the Act of March 3, 1899, 30 Stat. 1121, 1153 (U. S. C., Title 33, Sec. 502), which provides, in pertinent part, as follows:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each

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case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed."

The Southern Railway Company being in default under the notice, the Secretary of War, in accordance with the requirement of the statute, referred the matter to the Department of Justice on January 13, 1933, and in February, 1933, the United States Attorney for the Southern District of Alabama filed a criminal information against the Company. Upon trial of the case in October, 1935, the jury returned a verdict of guilty, and the court imposed a fine of $1,000. The Company appealed, and the appeal is now pending before the Circuit Court of Appeals for the Fifth Circuit.

Since the institution of the criminal proceedings, the Railway Company has made application to the Interstate Commerce Commission to abandon a certain part of its branch line between Mobile and Selma which includes the bridge, the basis of the application being that that part of the line is being operated at a heavy loss to the Company. It appears that the abandonment requested would in effect be an abandonment of the whole branch line between Mobile and Selma and would adversely affect the economic

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status of the citizens of the section served by that branch. Numerous civil, political, and social organizations, residents of the small towns and villages in the locality, and others, have urged you to suspend or extend the order requiring the alteration of the bridge. The Southern Railway Company has stated that it will withdraw its application before the Interstate Commerce Commission for abandonment and will dismiss its appeal now pending before the Circuit Court of Appeals if the period within which the alterations are required by the notice is extended for one year from the present time.

You are in doubt as to your authority to make such extension, and you therefore request my opinion in regard thereto.

The statute provides that if the Secretary of War finds an unreasonable obstruction to navigation to exist he shall prescribe a reasonable time for the making of the changes necessary to remove the obstruction, and that if the changes are not made within the period prescribed the Secretary shall forthwith notify the United States Attorney for the district in which the bridge is located, to the end that the criminal proceedings provided for may be taken. The Secretary is given no further power respecting enforcement of his order. It would seem to be contemplated by the statute that the Secretary shall determine finally before referring the matter to the Department of Justice that a reasonable time has elapsed for making the required alterations.

In the instant case the matter was not only referred to the Department of Justice after the lapse of the time prescribed by the Secretary of War, but the Railway Company has been tried since in the District Court for the Southern District of Alabama and found guilty of wilful failure and refusal to make the alterations prescribed. The conviction necessarily involved a judicial determination that the Railway Company had theretofore had a reasonable time within which to comply with the order of the Secretary of War; for if a reasonable time had not elapsed, the Company would not have been guilty of wilfully failing or refusing to comply with the order.

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Furthermore, as appears from the transcript of record, the Railway Company did in fact contend that the time prescribed by the Secretary of War was not reasonable because the Company was financially unable to make the alterations within that time. Since the question as to the reasonableness of the time prescribed was in issue in the criminal proceedings and was decided adversely to the Company, an extension by the Secretary of War at this time would in effect be a nullification of the judgment of the District Court. Especially would this be true if an extension were to be granted on account of the Company's financial condition, for that is the very fact relied on by the Company at the trial. The statute cannot be construed so as to give the Secretary of War such power.

Conceding, but not deciding, that circumstances may arise which would justify the Secretary in granting an extension before reference of the matter to the Department of Justice, and possibly at any time prior to institution of criminal proceedings, the statute contains no language suggesting that the Congress intended to clothe the Secretary with authority to abrogate or nullify the verdict of the jury and the judgment of the court in criminal proceedings prosecuted pursuant to the statute. On the contrary, the procedure outlined by the statute clearly indicates that the Secretary is not empowered to interfere with, or take any action inconsistent with, such judicial proceedings.

For the reasons stated, it is my opinion that you are without authority to grant the Railway Company an extension of time for making the alterations specified in the order.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF WAR.

VALIDITY OF A PROPOSED BOND ISSUE OF PUERTO RICO

The proposed bond issue of Puerto Rico in the amount of $75,000 for the retirement of bonds issued for financing the construction of the Isabela Irrigation System is authorized under the Acts cited

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herein; and the form of bond submitted complies with the law and the determinations of the Treasurer of Puerto Rico approved by the Governor.

DEPARTMENT OF JUSTICE,
March 31, 1936.

SIR: I have your letter of March 18, stating that your Department has been authorized to sell for the account of the Government of Puerto Rico bonds of the face value of $75,000, the proceeds of which are to be used in the payment of the principal of bonds heretofore issued and sold in connection with the construction of the Isabela Irrigation System, and requesting my opinion concerning their legality.

It is proposed to issue the bonds under authority contained in Section 3 of the Act of Congress approved March 2, 1917, entitled "An Act to provide a civil government for Puerto Rico, and for other purposes," as amended by the Act of March 4, 1927 (c. 145, 39 Stat. 951, 953; c. 503, 44 Stat. 1418; U. S. C., Title 48, Secs. 741, 745), and Act No. 59 of the Legislature of Puerto Rico, approved June 18, 1919, as amended by Act No. 61, approved July 21, 1923, and Act No. 31, approved July 20, 1935, as modified by the Joint Resolution of Congress approved June 5, 1933, "To assure uniform value to the coins and currencies of the United States" (48 Stat. 112).

You state that they are to be issued in coupon form, in the denomination of $1,000 each, to be dated January 1, 1936, and to bear interest at the rate of 3 per centum per annum, payable at the Treasury of the United States semi-annually on January 1 and July 1 of each year, the principal thereof to be payable January 1, 1975, reserving, however, to the People of Puerto Rico the right to redeem all or any number of the said bonds at 5 per centum above par, with accrued interest, on January 1, 1946, or on any interest payment date thereafter, upon giving six months' notice in such manner as may be prescribed by the Treasurer of Puerto Rico. A copy of the form of the proposed bond was submitted with your letter.

Section 3 of the Act of March 2, 1917, as amended, provides:

" * * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by

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Puerto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however*, That no public indebtedness of Puerto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Puerto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Puerto Rico has heretofore been pledged and bonds issued by the people of Puerto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Puerto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Puerto Rico is pledged shall be counted."

Your letter and the documents submitted by you show that the aggregate assessed valuation of real and personal property in Puerto Rico on September 30, 1935, amounted to $289,628,594, that on the said date there were outstanding bonds of the Government of Puerto Rico of the face value of $27,600,000 (including bonds of the face value of $120,000 approved in my opinion of July 9, 1935, but not issued at the time of the Treasurer's statement) and notes evidencing temporary loans of the face value of $642,494.54, that since the amendatory Act of March 4, 1927, the good faith of the people of Puerto Rico has been pledged to the payment of principal and interest on outstanding municipal bonds aggregating $1,198,500, which, under the statute, must be added to the foregoing, making a total of $29,440,994.54. From this amount, however, there is to be deducted $492,874.22, representing the amount accumulated in the various sinking funds, pledged by statute and applicable only to the payment of unmatured obligations included in the foregoing total figures (35 Op. 9, 14; 37 id., 30, 32), and a further sum of $250,000, representing 1914 refunding bonds (also included in the foregoing total figures), secured by municipal bonds held by the insular government and therefore to be deducted when ascertaining the amount of the permitted indebtedness of that govern-

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ment, as provided in the Act of Congress, making a net total of $28,698,120.32.

Considering the foregoing figures, and understanding that the matter is not affected by any material increase in the amount of the temporary loans since the date of the Treasurer's certificate (October 21, 1935), it is apparent that the indebtedness of the Government of Puerto Rico when increased by the amount of the contemplated issue will be within the maximum permitted by law (10% of the aggregate tax valuation). It is unnecessary to consider for present purposes the issue of refunding bonds of the face value of $3,778,000 approved in my opinion to you of September 25, 1935 (38 Op. 286), because the Act of Congress of August 3, 1935 (Public No. 236, 74th Cong., 49 Stat. 516), which authorized them provided that they should not be included when computing the public indebtedness of Puerto Rico under Section 3 of the Organic Act until six months after their issue; furthermore, the issuance of those bonds and the application of the proceeds to the retirement of outstanding bonds represents no increase in the total indebtedness, save during the brief period necessary to complete the refunding operations, as pointed out in my opinion of September 25, 1935.

The Act of the Legislature of June 18, 1919, as amended by the Act of July 21, 1923, authorized a total bond issue of $3,325,000 for construction of the Irrigation System, to mature in series of $75,000 each on January 1 of the year 1929 and subsequent years. The bonds were duly issued and approved as to validity (34 Op. 331), and one such series has matured on January 1, 1936.

Section 2 authorized the issuance of refunding bonds to pay the principal of issues falling due in years when the special assessments provided for such purpose should be insufficient. Later acts of the legislature authorized several series of bonds both for refunding and for operation and maintenance to meet exigencies which had required temporary reductions in assessments, and such bonds have also been duly issued and approved. (Op. October 21, 1933, 37 Op. 300.) Section 2 was amended by the Act of May 1, 1934, and its authority availed of for refunding the series which matured on January 1, 1935, the refunding issue of that date

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being approved in my opinion to you of January 9, 1935. Section 2 has been further amended by an Act of the legislature approved July 20, 1935, and now reads as follows:

"Section 2.—Should the proceeds of the special assessment as provided for in the Act above mentioned (Section 29), be insufficient in any year to meet the entire amount of the payment of the principal on outstanding bonds falling due that year in addition to the other necessary payments, as provided in the aforesaid Act, then the Treasurer of Puerto Rico may, with the approval of the Governor, issue new refunding bonds to the amount necessary to pay the principal falling due during the said year; *Provided*, that should no tax be paid on lands in the temporary or permanent irrigation district during any year as provided for in Sections 24 and 29 of the above-mentioned Act, or should the amount received from taxes upon the lands in the said irrigation districts be so reduced because of the operation of the said sections as to require it, then the Treasurer of Puerto Rico may, with the approval of the Governor, issue such additional bonds as may be necessary to cover all expenses and to meet all the obligations of the irrigation system for the said year; *Provided*, that the total amount of such additional bonds issued to cover expenses and to meet obligations of the irrigation system during any year or years in which, in accordance with Sections 24 and 29 of the aforesaid Act, no tax is paid on lands in the said irrigation districts in which the amount received from taxes is insufficient to meet the said expenses and obligations of the irrigation system, shall not at any time exceed the total amount of irrigation bonds previously authorized; *And provided, further*, that the aforesaid refunding bonds shall be issued in series which shall not exceed seventy-five thousand (75,000) dollars each, of like denominations, and under the same terms and conditions, and shall bear interest at the same rate as that provided in Section 4 of this Act. The said refunding bonds shall mature in series in the order of their issue. The first series of refunding bonds shall mature January 1, 1974, and each of the following series shall mature on the first day of January of each of the following years; but any or all of the series of refunding bonds may be redeemed, at the will of The People of Puerto Rico, ten

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years after the date of their issue, at five (5) per cent above par, and accrued interest, on any interest payment date, by giving six months' notice in such manner as may be prescribed by the Treasurer of Puerto Rico. The bonds, the issuance of which is authorized in this Act, may be sold by the Secretary of the Interior of the United States."

The Act of July 20, 1935, also amends Section 4 of the original act, and provides that the bonds may be in coupon or registered form, in denominations of one thousand, five thousand, and (or) ten thousand dollars, and shall bear interest at a rate not exceeding 4½ per centum per annum, payable semi-annually. It is further provided that the bonds are to be sold as near the date of issuance as practicable; and that the Treasurer with the approval of the Governor, under the limitations prescribed therein, shall have entire charge and authority in connection with all matters relating to said bonds. For the payment of both principal and interest the good faith of the People of Puerto Rico is irrevocably pledged.

There was transmitted with your letter a statement signed by the Treasurer of Puerto Rico, setting forth his determinations in those matters left to his discretion, and this has been approved by the Governor, as provided in the Act of the Legislature. The statement and the figures submitted by you show that the proceeds of the special assessment, mentioned in Section 2 of the 1919 statute, as amended, are insufficient in the present fiscal year to meet the principal of the bonds falling due on January 1, 1936, in addition to the other necessary payments chargeable against the proceeds of the assessment, within the contemplation of the statute, and that the entire authorized issue of $75,000 is required to meet the deficiency.

I find that all the statutory requirements regarding the issue and sale of the said bonds have been complied with and that the form of bond submitted is in compliance with the law and the determinations of the Treasurer, approved by the Governor. The form of bond properly recites that "under the provisions of Section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Puerto

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Rico or any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia."

It is therefore my opinion that the bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Puerto Rico.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

EFFECT OF THE ACT OF JUNE 13, 1933, UPON THE DEFINITION OF THE TERM "STEAM VESSEL" CONTAINED IN SECTION 4399 REVISED STATUTES.

The Act of June 13, 1933, amending Section 4399 of the Revised Statutes is ambiguous and leaves the laws relating to regulation of mechanically propelled vessels in a state of uncertainty; and clarifying legislation would seem to be desirable.

Pending the enactment of such legislation, the present practice should be continued—attributing to the Act of June 13, 1933, the effect of extending to vessels not previously included in Section 4399 R. S. only those provisions of the regulations contained in Sections 4418 and 4428–4434 R. S. as amended and reenacted by that Act.

DEPARTMENT OF JUSTICE,
April 8, 1936.

SIR: I have your request of March 12, signed by Assistant Secretary Johnson, for my opinion "as to whether 4399 R. S., as amended, extends the definition of 'steam vessel' so as to make a vessel so defined subject to all of the provisions of the steamboat inspection laws * * * or subject only to Secs. 4418, 4428 to 4434 R. S."

Section 4399 R. S. (U. S. C., Title 46, Sec. 361) originally read as follows:

"SEC. 4399. Every vessel propelled in whole or in part by steam shall be deemed a steam-vessel within the meaning of *this Title*." [Italics supplied.]

The words, "this title", referred to Title LII of the Revised Statutes relating to regulation of steam vessels.

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The Act of June 13, 1933, c. 61, 48 Stat. 125, amended and reenacted Section 4399 R. S. so as to read (literally) as follows:

"SEC. 4399. Every vessel subject to inspection propelled in whole or in part by steam or by any other form of mechanical or electrical power shall be considered a steam vessel within the meaning of and subject to all of the provisions of *this Act;* Provided, however, That motor boats as defined in the Act of June 9, 1910, are exempt from the provisions of this Act." [Italics supplied.]

It also amended and reenacted Sections 4418 and 4428–4434, which are included in Title LII of the Revised Statutes.

Considering the sections, thus amended, as part of, and inserted in their proper places in, the Revised Statutes the italicized words, "this Act", in Section 4399 are meaningless unless construed. Apparently, they must be construed as contemplating either "this Title" (Title LII) or only Sections 4418 and 4428–4434 thereof, as amended and reenacted in the Act of June 13, 1933. I indicate below some considerations, and the conclusions, or apparent conclusions, heretofore reached which support the respective views suggested.

Favorable to the view that "this Act" means "this Title"—The opinion of your Solicitor.

The language used by the Committee on the Revision of the Laws, of the House of Representatives, when embodying the amended section in the amendment to the United States Code and, thereafter, in the new (1934) edition of the United States Code—stating the section as applicable to those chapters of the Code which correspond to Title LII R. S. (U. S. C., Title 46, Sec. 361.)

There is room to doubt the appropriateness of the amendment of Section 4399 R. S. if intended to be confined in its application to Secs. 4418 and 4428–4434. They do not expressly employ the term "steam vessel." Other sections included in Title LII do mention "steam vessels", "steamboats", etc., and it may be regarded as anomalous if the statutory definition long applicable to them is no longer applicable.

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Opposed to the view that "this Act" means "this Title"—

The actual administration of the statute in your Department.

The following explanation of the amendment, in the compilation of "Laws Governing Steamboat Inspection, November 16, 1933," issued by your Department: "This act extends the jurisdiction of the Service only on inspected motor vessels in so far as boilers and unfired pressure vessels on the same are concerned."

The title of the Act of June 13, 1933, describes the Act as amending sections "relating to the construction and inspection of boilers, unfired pressure vessels, and the appurtenances thereof", and the legislative history contains nothing to indicate that the Congress contemplated extending the steam vessel regulations to non-steam type vessels except in so far as concerns the new, or amended, regulations therein set forth relating to boilers, unfired pressure vessels, appurtenances, etc. The bill was submitted to the Congress by your Department as needed to make "the boiler rules modern." Nothing was said, for example, concerning life-saving equipment, as to which the law prescribed different requirements for steam vessels and for those propelled by gasoline, electricity, etc. In some particulars, as applied to vessels of the same size and engaged in similar operations, there may be no reason for a difference, except that the laws were passed when vessels operated by mechanical power other than steam were relatively of minor importance; but the bill was only one of a number which your Department has submitted with purpose to modernize the requirements and to subject vessels propelled by mechanical power other than steam to the more rigid regulations applicable to steam vessels. (Repts. S. 61, 73d Cong.; S. 777, H. 1321, 74th Cong.)

The Senate has passed and, as I am informed, the House is now considering a bill (S. 2001) recommended by your Department which would amend Section 4426 R. S. (U. S. C., Title 46, Sec. 404) so as to extend the "steam vessel" regulations generally to large classes of vessels propelled by mechanical power other than steam, but even this does not include all such vessels. Apparently the present Congress

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has no idea that the same result, and more, was achieved by the 1933 amendment.

The House Committee on the Revision of the Laws, notwithstanding its treatment of Section 4399, as above mentioned, has included in the new United States Code, without change, other provisions of the old law directly in conflict with the view that the amendatory Act of June 13, 1933, extended indiscriminately to all mechanically propelled vessels except motor boats (as defined in the Act of June 9, 1910, 36 Stat. 462) *all* the laws regulating *steam* vessels. Thus Section 404 of Title 46 (Section 4426, Title LII, R. S.) is treated as unaffected, although it prescribes regulations for certain non-steam type vessels differing from those prescribed for "steam vessels." Section 515 of Title 46 prescribes life-saving equipment for "all vessels propelled by machinery other than by steam"—while other sections provide for different equipment for "steam vessels." The Act of June 13, 1933, provided for repeal of all conflicting laws, and parts of laws, but the foregoing provisions have not been treated as affected thereby.

It is thus apparent that the ambiguous language used in the Act of June 13, 1933, has left the laws relating to regulation of mechanically propelled vessels in a state of uncertainty. It would probably be difficult to maintain a proceeding to penalize a vessel propelled by power other than steam for failure to carry the life-saving equipment, for example, prescribed for steam vessels when it has complied with other sections of the statutes, not *clearly* repealed and included in the current edition of the United States Code as still effective, which provide other and different equipment—considering that the Code, by express provision, is *prima facie* the law (U. S. C., Title 1, Sec. 54), that your Department has, in effect, publicly announced that such vessels are not governed by the rules applicable to steam vessels, and that the Congress is now considering the amendment of provisions which would already have been repealed, at least in part, upon acceptance of the view necessary to maintain the assumed proceeding.

I respectfully suggest to you the advisability of bringing the matter to the attention of the Congress in order that it may clearly evidence its intention. Whether or not the

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pending bill (S. 2001) is enacted, it appears advisable that Section 4399 R. S. be again amended in order to make it clearly apparent whether or not all mechanically-propelled vessels other than motor boats are to be subject to all the regulations concerning steam vessels. The proviso to the section also needs clarification (1) because it likewise employs the words "this Act," with uncertain intendment, and (2) because it might be understood as exempting motor boats (including "every vessel propelled by machinery and not more than sixty-five feet in length," etc.) from express provisions subjecting some of them to particular steam-vessel regulations, including boiler inspection. etc. (U. S. C., Title 46, Secs. 404, 511, 520).

Pending the enactment of clarifying legislation, it is my opinion that the view heretofore applied by your Department in the administration of the statute should be adhered to; and this requires attributing to the amendment of June 13, 1933, the effect of extending to vessels not theretofore included in Section 4399 R. S. only those provisions of the regulations contained in Sections 4418 and 4428–4434, inclusive, as amended and reenacted in the Act of June 13, 1933.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF COMMERCE.

VALIDITY OF EXECUTIVE ORDER AUTHORIZING THE SECRETARY OF AGRICULTURE TO ACQUIRE LAND FOR WILDLIFE CONSERVATION PURPOSES

A proposed Executive Order authorizing the Secretary of Agriculture, with funds allocated to him under Title V of the Act of June 15, 1935, 49 Stat. 383, to acquire real property or any interest therein by purchase, condemnation, or otherwise, as he may deem necessary and advisable, for game bird and animal refuges and for migratory bird sanctuaries and refuges, is authorized under the said Title V and the Emergency Relief Appropriation Act of 1935.

DEPARTMENT OF JUSTICE,
April 9, 1936.

SIR: I am herewith transmitting a revised draft of a proposed executive order presented by the Secretary of Agricul-

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ture and submitted to me for consideration by the Acting Director of the Bureau of the Budget under date of April 1, 1936.

The proposed order, which has been revised as to form only, authorizes the Secretary of Agriculture, with funds allocated to him under Title V of the act of June 15, 1935, 49 Stat. 378, 383 (hereinafter referred to as Title V), to acquire real property or any interest therein by purchase, condemnation, or otherwise, as he may deem necessary and advisable for game bird and animal refuges and for migratory bird sanctuaries and refuges. In my opinion, the order is authorized under the said Title V and the Emergency Relief Appropriation Act of 1935 (49 Stat. 115).

Title V is as follows:

"TITLE V—ACQUISITION OF WILDLIFE REFUGES

"SEC. 501. The President of the United States is hereby authorized to allocate out of moneys appropriated to him under the terms of Public Resolution Numbered 11, Seventy-fourth Congress, approved April 8, 1935 [Emergency Relief Appropriation Act of 1935], such sum as he may deem necessary or advisable for the acquisition by purchase, or otherwise, including the necessary expenses incidental thereto, of areas of land and water or land or water for game bird and animal refuges and for migratory bird sanctuaries and refuges, *to be expended in accordance with the provisions of the said Public Resolution Numbered 11.*" [Italics supplied.]

Section 5 of the Emergency Relief Appropriation Act of 1935 reads:

"In carrying out the provisions of this joint resolution the President is authorized (within the limits of the appropriation made in section 1) to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein."

Section 3 of the Act provides, in part:

"In carrying out the provisions of this joint resolution the President may * * * utilize such Federal officers

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and employees * * * as may be necessary [and] prescribe their authorities, duties, responsibilities * * *."

It will be noted that Title V does not specifically authorize the acquisition of land by *condemnation*, although the phrase "by purchase, or otherwise" might possibly be construed to include condemnation. Section 5 of the Emergency Relief Appropriation Act, however, expressly authorizes the President to acquire land for carrying out the provisions of the Act by the power of eminent domain, which includes, of course, acquisition by condemnation. Since section 3 of the Act authorizes the President to utilize such Federal officers and employees as may be necessary in carrying out the purposes of the Act, he may delegate to the Secretary of Agriculture his authority to acquire land by purchase, condemnation, or otherwise, as provided in the proposed order.

It has been suggested that the Act of August 1, 1888, ch. 728, 25 Stat. 357 (U. S. C., Title 40, Sec. 257), may be considered sufficient authority for the exercise of the power of condemnation without reference to Title V, and if so, that the proposed order is unnecessary. The pertinent part of the act of August 1, 1888, is as follows:

"That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so * * *."

I am inclined to think that this statute does give sufficient authority for the condemnation of lands needed by the Government for the purposes set out in Title V, but it is to be noted that the statute gives the power of condemnation only to the Secretary of the Treasury or other officer authorized to procure real estate for public uses. In this instance the President is the officer authorized to acquire land. Hence the power of condemnation conferred by the statute upon the President must be delegated to the Secretary of Agriculture; and the proposed order effects such delegation.

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It is proper to observe here that if the Secretary of Agriculture should acquire land by condemnation without the express authorization of the President, such acquisition might be held valid on the theory that the act of the Secretary was in legal contemplation the act of the President. *Wilcox* v. *Jackson*, 38 U. S. 498, 513; *Wolsey* v. *Chapman*, 101 U. S. 755, 769; *French* v. *Weeks*, 259 U. S. 326, 334. However that may be, issuance of the proposed order will remove any doubt that might otherwise exist as to the authority of the Secretary of Agriculture to acquire land by condemnation for the purposes specified in the order.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

EFFECT OF ACT OF AUGUST 27, 1935, PROVIDING FOR DISPOSITION OF SURPLUS REAL PROPERTY, UPON CERTAIN EARLIER STATUTES AND CONTRACTS MADE THEREUNDER

The Act of August 27, 1935, c. 744, 49 Stat. 885, providing for the disposition, control, and use of surplus real property acquired by federal agencies, does not affect—

(1) The Act of May 28, 1935, c. 155, 49 Stat. 305, as amended by the Act of August 27, 1935, c. 754, 49 Stat. 896, authorizing the Secretary of Commerce to convey specified parcels of land to indicated states and cities for park purposes.

(2) Section 16 of the Merchant Marine Act, 1920, as amended (U. S. C., Title 46, Sec. 874), authorizing and directing the United States Shipping Board to dispose of certain properties acquired during the World War for housing employees of the United States, as applied to properties made the subject of contract with the Brooklawn Housing Corporation prior to passage of the Act of August 27, 1935.

(3) The Act of March 4, 1913, c. 168, 37 Stat. 1017, 1019 (U. S. C., Title 33, Sec. 752), as applied to five parcels of real property which were sold, upon advertisement, to the highest bidder and for which deeds were prepared but not executed and delivered prior to passage of the Act of August 27, 1935.

DEPARTMENT OF JUSTICE,
April 17, 1936.

SIR: I have the honor to refer to your letter of January 31, 1936, and subsequent correspondence, and to comply with your request for my opinion concerning the effect upon the

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other legislation hereinafter mentioned of the provisions of the Act of August 27, 1935, c. 744, 49 Stat. 885, which is entitled "An Act to provide for the disposition, control, and use of surplus real property acquired by Federal agencies, and for other purposes," and reads, in part, as follows:

"That notwithstanding any other provisions of law, whenever any real property located outside of the District of Columbia, exclusive of military or naval reservations, heretofore or hereafter acquired by any Federal agency, by judicial process or otherwise in the collection of debts, purchase, donation, condemnation, devise, forfeiture, lease, or in any other manner, is, in whole or in part, declared to be in excess of its needs by the Federal agency having control thereof, or by the President on recommendation of the Secretary of the Treasury, the Director of Procurement, with the approval of the Secretary of the Treasury, is authorized (a) to assign or reassign to any Federal agency or agencies space therein: *Provided*, That if the Federal agency to which space is assigned does not desire to occupy the space so assigned to it, the decision of the Director of Procurement shall be subject to review by the President; or (b) pending a sale, to lease such real property on such terms and for such period not in excess of five years as he may deem in the public interest; or (c) to sell the same at public sale to the highest responsible bidder upon such terms and after such public advertisement as he may deem in the public interest."

(1) The Act of May 28, 1935, c. 155, 49 Stat. 305, as amended by the Act of August 27, 1935, c. 754, 49 Stat. 896, contained a number of separate provisions authorizing the Secretary of Commerce to convey specified parcels of land to indicated states and cities for park purposes, etc., many such conveyances to be subject to conditions and with provision that in the event of nonperformance of the conditions the land shall revert to the United States. In one instance (section 2) the property is described as an abandoned lighthouse reservation, no longer needed and therefore required to be reconveyed to the State of Delaware "as stipulated in the original deed of conveyance to the United States."

The authorizing of these conveyances was motivated by purposes quite different from that which the Congress

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sought to accomplish through enactment of the general legislation above quoted. Both the amendment to the Act of May 28, 1935, and the general statute (providing for disposition, control and use of surplus real property) were approved on the same day, and it would have been idle to amend the Act of May 28 if it was wholly repealed by the other Act.

It is therefore my opinion that the Act of May 28, 1935, as amended by the Act of August 27, 1935, is unaffected by the provisions of the general statute also enacted on August 27, 1935.

(2) Section 16 of the Merchant Marine Act, 1920, as amended (U. S. C., Title 46, Sec. 874), authorized the United States Shipping Board to dispose of certain properties which had been acquired during the World War for housing employees of the United States, "at as early a date as practicable, consistent with good business and the best interests of the United States." Acting under this authority, the Shipping Board entered into a contract with the Brooklawn Housing Corporation. The contract is quite lengthy; it is sufficient for present purposes to state that it included an undertaking by the United States to convey to the Brooklawn Housing Corporation, upon its making the payments and on the terms and conditions set forth, a number of parcels of real property and mortgages on the real property. The contract was dated November 4, 1931, and provided for performance within one year; but, by mutual agreement of all the parties, including the surety, the period of performance has been extended from time to time, one such extension having been made after the passage of the Act of August 27, 1935. Before the Act was passed the Brooklawn Housing Corporation had accepted conveyance of all the real property except forty-seven parcels and, as I am informed, the Corporation is now demanding conveyance of the remaining forty-seven parcels and has tendered the balance due under the contract.

I agree with the conclusion of your Solicitor and the Director of Procurement, Treasury Department, (as set forth in documents submitted by you) that the provisions of the Act of August 27, 1935, did not extend to these properties, which had previously been made the subject of con-

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tract under Section 16 of the Merchant Marine Act and, therefore, cannot be regarded as property "declared to be in excess of its needs by the Federal Agency having control thereof, or by the President on recommendation of the Secretary of the Treasury," under and in accordance with the provisions of the Act of August 27, 1935. Furthermore, even assuming that the Act might have applied to the real property if the contract had been cancelled, it did not require cancellation of the contract (which dealt with matters other than sales and conveyances of real estate) or affect the right to deal with incidental matters arising in connection with performance of the several undertakings by the United States and by the Corporation.

It is therefore my opinion that the Act of August 27, 1935, does not affect the contract with the Brooklawn Housing Corporation and does not forbid conveyance to that Corporation of the remaining parcels of real property as therein provided for. As to any parcels of real property originally subject to disposition under Section 16 of the Merchant Marine Act, but not yet disposed of or made the subject of a contract entered into prior to August 27, 1935, I express no opinion and regard it as inadvisable to do so in the absence of specific cases accompanied by full statement of the facts and circumstances.

(3) The Act of March 4, 1913, c. 168, 37 Stat. 1017, 1019 (U. S. C., Title 33, Sec. 752), contained the following provision:

"When any condemned supplies, materials, equipment, or land can not be profitably used in the work of the Lighthouse Service, the same shall be appraised and sold, either by sealed proposals for the purchase of the same or by public auction after advertisement of the sale for such time as in the judgment of the Secretary of Commerce the public interests require, the proceeds of such sales, after the payment therefrom of the expenses of making the sales, to be deposited and covered into the Treasury as miscellaneous receipts as now provided for by law in like cases."

Acting under this authority, the Secretary of Commerce, during the years 1933 and 1934, directed the sale of five parcels of real property on sealed proposals after public notice. Bids were duly received and the highest bidder in each case

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was notified on August 13, 1935, that his bid had been accepted. All, or part, of the purchase price of the property in each instance was paid by the buyer and the monies are now in the possession of the United States. Deeds were prepared but, before being executed and delivered, the Act of August 27, 1935, became effective and since that time the matter has been held in abeyance. The Solicitor of your Department has concluded that the deeds may properly be executed and delivered, and the office of the Director of Procurement in the Treasury Department has taken the same view of the matter.

It is my opinion that the Act of August 27, 1935, is not to be interpreted as affecting the execution and delivery of the deeds to the five parcels of real property above mentioned under the circumstances stated.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF COMMERCE.

RATES THAT CONTRACT CARRIERS BY MOTOR VEHICLES MAY QUOTE TO GOVERNMENT UNDER SECTION 218 OF MOTOR CARRIER ACT

The provisions of Section 218 of the Motor Carrier Act, 1935, relating to minimum rates that may be charged by contract carriers by motor vehicles, do not apply to contracts with the Government; and contract carriers by motor vehicles may quote the Government lower rates than those contained in their schedules on file with the Interstate Commerce Commission.

The maxim *expressio unius exclusio alterius* considered and held inapplicable.

DEPARTMENT OF JUSTICE,
April 20, 1936.

SIR: Reference is made to your letter of April 4, 1936, in which you request my opinion as to whether "under the provisions of section 218 of the so-called Motor Carrier Act, 1935 (49 Stat. 543, 561; U. S. C., Title 49, Secs. 301–327), contract carriers by motor vehicles may quote lower rates to the Government than those prescribed in tariffs required to be filed with the Interstate Commerce Commission."

The Motor Carrier Act was enacted as an amendment to the Interstate Commerce Act (c. 1, U. S. C., Title 49), be-

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ing designated as Title II thereof. The Act relates to and defines both common carriers by motor vehicle and contract carriers by motor vehicle. Section 218, which relates only to contract carriers by motor vehicle, requires that such a carrier shall file with the Interstate Commerce Commission schedules of its minimum charges for the transportation of passengers or property in interstate commerce, and provides that it shall not demand, charge, collect, accept, or receive for such transportation a less compensation than that contained in the schedules filed by it until such schedules have been modified or changed in the manner prescribed in the section.

It is a well-established rule of common law that the sovereign authority is not bound by a statute which tends to restrain or diminish its powers, right, or interest unless it is named therein. *United States* v. *Herron*, 20 Wall. 251; *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152. Judge Story in *United States* v. *Hoar*, 2 Mason 314, stated the rule in the following language:

"Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

If section 218 of the Motor Carrier Act is binding on the Government, it deprives the Government of a right, namely: the right to contract with contract carriers by motor vehicle for transportation at the lowest possible rate. Therefore, under the rule above stated the provisions of the section are not applicable to contracts with the Government unless

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made so, either expressly or impliedly, by the provisions of the Act.

I find no language in either the section itself or any other parts of the Act which makes the section applicable by express terms; nor is there, in my opinion, anything in the section which by necessary implication makes it applicable. It will be noted, however, that section 217 of the Act, which relates to common carriers by motor vehicle and provides that such a carrier shall not charge for transportation in interstate or foreign commerce a higher or a lower rate than that contained in its schedules on file with and approved by the Interstate Commerce Commission, contains the following proviso:

"*Provided*, That the provisions of sections 1 (7) and 22 (1) of this title shall apply to common carriers by motor vehicles subject to this chapter."

The reference to Title I is to the Interstate Commerce Act as it existed prior to the enactment of the Motor Carrier Act as an amendment thereto, and section 22 (1) of that Act, which relates to the provisions governing rates which may be charged by carriers by rail and water, provides in part:

"Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, * * *."

The express exemption of Government contracts from the provisions of section 217, and also from the general provisions of the Interstate Commerce Act, and the absence of express exemption of such contracts from the provisions of section 218 raises the question whether under the maxim *expressio unius exclusio alterius* the provisions of section 218 are by necessary implication made applicable to such contracts.

The maxim *expressio unius exclusio alterius* "expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent * * *." *United States* v. *Barnes*, 222 U. S. 513, 519. "Great caution is requisite in dealing with it * * *. It is often a valuable servant, but a dangerous master * * * and * * * ought not to be applied, when its application * * * leads

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to inconsistency or injustice." *Ford* v. *United States*, 273 U. S. 593, 612. "It is not of universal application, and when to apply it would be to defeat the accomplishment of the manifest purpose of the act, and to prevent the attainment of the end for which the act was passed, we certainly must decline to be governed by it." *City of New York* v. *Davis*, 7 F. (2d) 566, 575. It is never applied when that which is expressed is merely declaratory of existing law; but only when it is creative of new law, or in derogation of existing law. *Straus* v. *Yeager*, 48 Ind. App. 448; 93 N. E. 877, 881; *Yardley & Co., Ltd.*, v. *United States*, 22 C. C. P. A. 390; *Barbat* v. *Allen*, 7 Exch. 608; Sutherland on Statutory Construction, 2d Ed., section 491; Maxwell on Interpretation of Statutes, pp. 547, 548. It is never invoked when to do so would contradict the public policy of the sovereign. *Forsythe* v. *Paschal*, 34 Ariz. 380; 271 Pac. 865.

The exemption of contracts with the Government from the provisions of section 217 and Title I of the Act does not create any new law. Such contracts would be exempt without any express statement in the Act to that effect. The exemption is therefore merely declaratory of the law as it already existed, and is not creative. Moreover, to apply the rule in this case, thereby making the provision of section 218 applicable to contracts with the Government, would not only be in derogation of the rights of the Government, but would also be contrary to the public policy of the United States as expressed by the Congress in various statutes requiring that all Government contracts, except in cases of emergency, be let to the lowest responsible bidder after proper advertising. This policy of the Government with respect to contracts is not to be lightly passed over, and certainly it should not be cast aside unless the Congress by clear expression so directs.

The purpose of the Motor Vehicle Act, expressly stated therein, is to regulate transportation by motor carriers in such manner as to foster, promote, and protect interstate and foreign commerce by motor carriers, and to prevent in connection therewith unreasonable charges and unjust discriminations resulting in undue preferences or advantages and unfair or destructive competitive practices. It is not

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necessary for such purposes that section 218 be binding upon the Government. The unreasonable charges, unjust discriminations, undue preferences, and unfair destructive competitive practices sought to be prevented relate entirely to private shippers. As was said by the Supreme Court in *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, 323, in discussing the analogous requirements contained in the Interstate Commerce Act, "the grant of a lower rate * * * to a government * * * may benefit the government without subjecting to prejudice any person, locality or class of traffic." Again, in *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, 425, the Court, discussing the same principal as related to telegraph rates, said:

"It may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the Government provisional rates."

Moreover, to hold that section 218 is applicable to Government contracts would give rise to an inconsistency. One of the expressed purposes of the act is to prevent unjust discrimination. It would indeed be an anomaly to hold that the Congress intended to make the general purposes of the Act, including the purpose to prevent *unjust discrimination*, relate to contracts with the Government as well as to contracts with private shippers, and also to hold that it intended by section 218 of the act to deny to contract carriers by motor vehicle the same freedom in making contracts with the Government that common carriers by motor vehicle are, under the proviso in section 217, expressly permitted to enjoy. Such a paradox should not be assumed from the mere fact that the Congress in section 217 and Title I of the Act inserted a provision which was merely declaratory of existing law.

It is my opinion, therefore, that the provisions of section 218 do not apply to contracts with the Government, and that contract carriers by motor vehicle may quote to the Government lower rates than those contained in their schedules on file with the Interstate Commerce Commission.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

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AUTHORITY TO DESIGNATE AN ACTING GOVERNOR OF PUERTO RICO—DELEGATION OF STATUTORY POWERS

The power of appointment conferred by statute cannot be delegated without statutory authority.

Although every reasonable presumption of validity is to be indulged with respect to the performance by the head of a department of a duty imposed upon the President, nevertheless, the President cannot, without statutory authority, delegate a discretionary duty, relieving himself of all responsibility, so that the performance of the duty will not be his act but wholly the act of another.

The power of designating, under the Organic Act of Puerto Rico, an Acting Governor of Puerto Rico is properly to be exercised through the head of the department charged with the administration of Puerto Rican affairs, but in such manner that the designation will be, in effect, that of the President rather than that of the head of the department.

DEPARTMENT OF JUSTICE,
April 24, 1936.

SIR: I have your memorandum of April 22, 1936, requesting my recommendation with respect to the suggestion that you authorize the Secretary of the Interior, or in his absence the Acting Secretary of the Interior, to designate the Acting Governor of Puerto Rico from time to time under the following provision of the Organic Act (U. S. C., Title 48, Sec. 772):

"The President may from time to time designate the head of an executive department of Puerto Rico to act as governor in the case of a vacancy, the temporary removal, resignation, or disability of the governor, or his temporary absence, and the head of the department thus designated shall exercise all the powers and perform all the duties of the governor during such vacancy, disability, or absence."

"Designate" is sometimes used as synonymous with "appoint" (*County of Santa Barbara* v. *Janssens*, 177 Cal. 114, 118; *Cunio* v. *Franklin County*, 285 S. W. 1007, 1008; *People* v. *Fitzsimmons*, 68 N. Y. 514, 519), and it has been held that the power of appointment conferred by statute cannot be delegated without statutory authority (21 Op. 355, 356; 29 *id.* 273, 274). The statute does not expressly authorize you to delegate the power to designate an Acting Governor, differing in this respect from some other statutes

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under which the Executive has delegated the power to make appointments to office.

In my opinion to you under date of June 16, 1934 (37 Op. 570), I concluded that the Governor of the Virgin Islands was authorized to designate an Acting Governor of the Virgin Islands, his designation, however, being expressly approved by the President. The statute there involved differs materially from the provision in the Organic Act of Puerto Rico. Furthermore, it has been judicially determined that an appointment made by a subordinate officer with approval of a superior may be regarded as an appointment by the latter. *United States* v. *Hartwell*, 6 Wall. 385, 393–394.

It is manifestly impossible for the President to execute every duty, and every detail thereof, imposed upon him by the Congress. The courts have recognized this and have further recognized that he usually and properly acts through the several executive departments. Every reasonable presumption of validity is to be indulged with respect to the performance by the head of a department of a duty imposed upon the President and executed by the department head ostensibly in behalf of the President. Nevertheless, the authorities indicate that the President cannot, without statutory authority, delegate a discretionary duty, relieving himself of all responsibility, so that the duty when performed will not be his act but wholly the act of another. *Williams* v. *United States*, 1 How. 290, 297; *Runkle* v. *United States*, 122 U. S. 543, 557; *United States* v. *Fletcher*, 148 U. S. 84, 88; *French* v. *Weeks*, 259 U. S. 326, 334.

The power of designating from time to time an Acting Governor of Puerto Rico is quite properly to be exercised through the head of the department charged with the administration of Puerto Rican affairs (now the Department of the Interior), but in such manner that the designation will be, in effect, that of the President rather than of the head of the department; and this course, as I understand it, has been followed in the past. There is no prescribed formula for accomplishing the result.

The recommendation now before you is that Dr. Padin, Commissioner of Education of Puerto Rico, be designated as Acting Governor during the present absence of the Governor. I respectfully suggest that there would be no legal

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objection to the designation by you of Dr. Padin, or the present head of some other executive department of Puerto Rico, to act as Governor upon all occasions of the Governor's absence hereafter occurring, until otherwise ordered and except as other designations may be made from time to time in particular instances.

In the meantime, since the matter is urgent, I respectfully suggest, if action has not already been taken, that you designate Dr. Padin to act during the present absence of the Governor or that you specifically direct the Secretary of the Interior to so designate him.

The letter of April 21, 1936, from the Secretary of the Interior is returned herewith.

Respectfully,

JOSEPH B. KEENAN,
Acting Attorney General.

To the PRESIDENT.

CONDITIONS PRECEDENT TO EXPENDITURE OF APPROPRIATION FOR SETTLEMENT OF INDEBTEDNESS AGAINST PERSHING HALL

An assurance or commitment of the American Legion, Inc., to the effect that it will assume the duties of maintaining and perpetuating Pershing Hall, Paris, France, is not a condition precedent to the expenditure of the funds appropriated by the Act of August 12, 1935, c. 508, 49 Stat. 571, for the settlement of the indebtedness against the said Hall.

DEPARTMENT OF JUSTICE,
May 6, 1936.

SIR: Reference is made to the letter of April 23, 1936, signed by Acting Secretary of the Treasury Taylor, in which you request my opinion on the question whether some assurance or commitment of the American Legion, Inc., to the effect that it will undertake the duties of maintaining and perpetuating Pershing Hall, Paris, France, is a necessary condition precedent to the expenditure of the fund appropriated by the Act of August 12, 1935, for the settlement of the indebtedness against Pershing Hall.

The Act of June 28, 1935, ch. 323, 49 Stat. 426, hereinafter referred to as the authorizing Act, provides:

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"That $482,032.92 of the fund entitled 'Recreation fund—Army', created by the War Department Appropriation Act, approved March 4, 1933, is hereby authorized to be appropriated by the Secretary of the Treasury for effecting a settlement of any indebtedness connected with Pershing Hall, a memorial already erected in Paris, France, under the auspices of the American Legion, Inc., to the commander in chief, officers, men and auxiliary services of the American Expeditionary Forces, to the end that such memorial as so freed from debt may be perpetuated: *Provided*, That the amount herein provided shall not be used for the purposes indicated herein, until the legal title to said property shall have been vested in the Government of the United States for the use and benefit of all American officers and enlisted men of the World War.

"SEC. 2. Any balance remaining after settlement of such indebtedness shall be retained by the Secretary of the Treasury as a special fund to be known as the 'Pershing Hall Memorial Fund.' The Secretary of the Treasury is authorized (a) to invest and reinvest any part or all of the corpus of this fund so remaining in interest-bearing United States Government bonds and retain custody thereof; and (b) upon request of the American Legion, Inc., the Secretary of the Treasury shall pay to the National Treasurer of the American Legion, Inc., from time to time any part of the earnings upon the fund for use in the maintenance and/or perpetuation of Pershing Hall.

"SEC. 3. An itemized report shall be transmitted to the Senate and House of Representatives on the first day of each regular session of Congress of expenditures made in pursuance herewith."

The Act of August 12, 1935, ch. 508, 49 Stat. 571, to which your inquiry is specifically directed, in so far as it refers to the question presented, provides (p. 594):

"For settlement of any indebtedness in connection with Pershing Hall, a memorial already erected in Paris, France, under the auspices of the American Legion, Inc., to the commander in chief, officers, men, and auxiliary services of the American Expeditionary Forces, and for the creation by the Secretary of the Treasury of a special fund to be known as the 'Pershing Hall Memorial Fund', to be derived from

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the 'Recreation fund, Army', created by the War Department Appropriation Act approved March 4, 1933: *Provided*, That the amount herein appropriated shall not be used until the legal title to said property shall have been vested in the Government of the United States for the use and benefit of all American officers and enlisted men of the World War, all as authorized by the Act approved June 28, 1935, to remain available until expended, $482,032.92."

The language of these acts directing the use of the moneys appropriated is positive and explicit, and must be taken in its natural and obvious sense unless the context clearly shows a different use. *Lake County* v. *Rollins*, 130 U. S. 662, 667; *United States* v. *Union Pac. R. R. Co.*, 91 U. S. 72, 85; *Child Labor Tax Case*, 259 U. S. 20, 36. Your General Counsel points out, however, that the only provision made by the Acts for jurisdiction over and maintenance of Pershing Hall is the provision in section 2 (b) of the authorizing Act, which provides that upon the request of the American Legion, Inc., the Secretary of the Treasury shall pay to the Treasurer of that organization the earnings upon the "Pershing Hall Memorial Fund" for use by it in the maintenance and perpetuation of Pershing Hall. From this he reasons that since it must be assumed that the Congress would not authorize the purchase of Pershing Hall without making provision for its maintenance, and since no provision is made for such maintenance by any agency other than the American Legion, Inc., it must be held that it was the intention of Congress that the funds appropriated should not be expended for the purposes of the act unless and until the American Legion, Inc., signified its willingness to assume the duty of such maintenance.

I am unable to agree with this view. Reading the two Acts together, the appropriation as made is for the definite purpose of "effecting a settlement of any indebtedness connected with Pershing Hall, a memorial already erected * * * to the end that such memorial as so freed from debt may be perpetuated"; and establishing "a special fund to be known as the Pershing Hall Memorial Fund", to be invested and held by the Secretary of the Treasury. In my opinion, the only condition precedent to the use of the moneys appropriated for the purposes specified is that con-

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tained in the provisos in the Acts, expressly prohibiting the use of such moneys "until the title to said property shall have been vested in the Government of the United States for the use and benefit of all American officers and enlisted men of the World War." The clause in Section 2 of the authorizing Act directing the Secretary of the Treasury, upon the request of the American Legion, Inc., to pay over the earnings from the special fund to the Legion for use in the maintenance and perpetuation of Pershing Hall is, it seems to me, in the nature of a grant of a permissive right rather than a statement of a condition precedent. It is conceivable that the American Legion might decline to assume the duties of maintenance and perpetuation under any condition. Therefore, to hold that the Congress intended that the use of the appropriated moneys for the specific purposes designated should be conditioned upon an uncertain action which might or might not be taken by the American Legion, would be, in effect, to hold that the Congress has granted to the American Legion, not by express terms but by implication only, the administrative power and discretion to either put the statute into effect or completely nullify it. Such a construction may not, in my opinion, be accepted. (*United States* v. *Lexington Mill Co.*, 232 U. S. 399.)

The history of the legislation is also significant. The authorizing Act originated in the Senate as Senate Bill No. 2917. As originally introduced its title read: "Authorizing an appropriation to the American Legion for its use in effecting a settlement of the remainder due on, and the reorganization of, Pershing Hall, a memorial already erected in Paris, France, to the commander in chief, officers, and men of the expeditionary forces." The bill provided that the balance not required for settling the indebtedness on Pershing Hall should be available for expenditure by and under the direction of the American Legion, Inc., for the maintenance and/or to secure the perpetuation of Pershing Hall. Before its enactment into law it was amended in several respects, among others: (1) by the elimination of the reference to the American Legion in the title thereof; (2) by the elimination of the requirement that the balance not required for settling the indebtedness should be available for expenditure by and under the direction of the American Legion, and

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the substitution therefor of section 2 of the act as approved; and (3) by the addition of the proviso in section 1 requiring the title to the property to be vested in the United States.

The House Committee Report on the bill reads in part as follows:

"S. 2917, originally identical in language with H. R. 8443, was amended in the Senate to provide that the title of Pershing Hall shall have been vested in the Government of the United States before the Stars and Stripes Fund of $482,032 shall be used to free the hall from debt.

* * * * * * *

"The purpose of the bill is to allow the use of a fund in the Treasury Department which was accumulated during the World War through the publication of the American Expeditionary Force newspaper known as 'The Stars and Stripes', to be applied to liquidate indebtedness incurred in connection with the erection of the memorial Pershing Hall in Paris, France. The purpose is to give back to the World War veterans insofar as possible the veterans' money, not one dollar of it belonging to the Government or the taxpayers.

* * * * * * *

"Not one dollar of the money comprising the Stars and Stripes fund came from the taxpayers, but on the contrary came from the pockets of the American soldiers, sailors, and marines in France and from other sources of revenue which the publication may have had in addition to the sale of newspapers. Clearly the money cannot be returned to the individuals from whom it came. Your committee believes that the saving in this manner of Pershing Hall would constitute as worthy and appropriate use of this fund as could be possibly found."

The Senate Committee Report on the bill reads in part as follows:

"In the American Legion convention in 1927, there was authorized the erection of a memorial building which in its original conception was known as the 'American Legion Building.' This building was later and is now named 'Pershing Hall.' The building was erected at a total cost of approximately $540,000. What seemed at the time to be a

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sufficient amount of money to pay for the building and provide for its maintenance was at that time and later subscribed by various organizations and by individuals. However, due to the depression of 1929, the change in rates of exchange, and various unforeseen circumstances, the actual amount finally collected toward the building was only between $540,000 and $500,000. Mortgages and liens on the building are now due and in imminent danger of foreclosure. The project is beyond the financial resources of the American Legion and no hope of help from other sources. However there is now on deposit a trust fund accumulated from profits of the Stars and Stripes, the American newspaper published by and for the members of the American Expeditionary Forces. This fund amounts to $482,032.92, and under a proviso in the last War Department Act, is to revert to the Treasury of the United States on July 1, 1935, with no benefit to the men who were responsible in fact for the accumulation of the fund. This bill (S. 2917) proposes to utilize this fund for the worthy purpose of disposing of the existing indebtedness on Pershing Hall and to assist in its future maintenance.

"* * * the State Department points out that Pershing Hall is the Paris home of the American Legion and bearing as it does the name of the General of the Armies is viewed by a large section of the French people as something in the nature of a national monument. The Department further states that in the event Pershing Hall should not be reorganized and freed from debt, it would be a serious blow to American prestige and to the financial credit in France of private American institutions."

Incorporated in both the Senate Report and the House Report is a letter from Secretary of State Hull to Senator Sheppard, in which the following language is used:

"* * * It will be recalled that Pershing Hall is the Paris home of the American Legion and bearing as it does the name of the General of the Armies is viewed by a large section of the French people as something in the nature of a national monument.

"Without entering into the question of the financing or the organization of the hall, the Department of State can safely assert that if Pershing Hall should not be reorganized and

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freed from debt, it would be a serious blow to American prestige and to the financial credit in France of private American institutions."

This legislative history, in my opinion, shows clearly that the main purpose of the legislation is to provide for the settlement of the indebtedness against Pershing Hall, upon the title thereto vesting in the United States, thereby preventing a sale of the property under existing liens with probable detriment to American prestige. In this connection it will be noted that the title to the property is to be vested in the Government of the United States "for the use and benefit of all American officers and enlisted men of the World War." Many such officers and enlisted men are not members of the American Legion.

Conceding for present purposes, but not deciding, that it must be assumed that the Congress, in passing these statutes, intended to make immediate and certain provision for the maintenance and perpetuation of Pershing Hall, it does not, in my opinion, necessarily follow that the construction of the statutes suggested by your General Counsel must be accepted. Such an intention may be given effect by a different, and, I think, a more reasonable construction. If such an intention must be read into the statutes, it is my view that the statutes properly construed provide: (1) for the settlement of the indebtedness against Pershing Hall; (2) for the establishment out of the remainder of the appropriation of a special fund to be held and invested by the Secretary of the Treasury; and (3) for the perpetuation and maintenance of Pershing Hall as a Government institution—such maintenance by implication to be effected by some department of the Government, most likely the Treasury Department—out of the earnings of such special fund, subject to the right of the American Legion, Inc., if it so elects, to assume and discharge the duties of such maintenance and perpetuation and be reimbursed out of the earnings of such special fund for its expenses incurred in connection therewith.

It is suggested by your General Counsel that such a construction of the statute is not permissible for the reason that the Treasury Department does not have facilities available for the maintenance of a building in Paris, and that, there-

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fore, the Congress could not have intended such maintenance. In this connection the Supreme Court has said:

"It is not enough merely that * * * objectionable * * * consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be * * * objectionable. But in such case the remedy lies with the law making authority * * *." *Crooks* v. *Harrelson*, 282 U. S. 55.

Moreover, a public officer lawfully charged with the performance of a public duty is clothed with full authority to take such steps as are necessary for such performance. *State* v. *Illinois Cent. R. Co.*, 246 Ill. 188; *State* v. *Younkin*, 108 Kan. 634; *State* v. *Hackmann*, 276 Mo. 110.

It is my opinion, therefore, that the assurance or commitment from the American Legion, Inc., that it will assume the duties of maintaining and perpetuating Pershing Hall is not a condition precedent to the expenditure of the funds appropriated.

Respectfully,

HOMER CUMMINGS,

To the SECRETARY OF THE TREASURY.

EFFECT OF ACT OF AUGUST 27, 1935, PROVIDING FOR DISPOSITION OF SURPLUS REAL PROPERTY, UPON SECTION 16 OF MERCHANT MARINE ACT, 1920

The Act of August 27, 1935, providing for the disposition, control, and use of surplus real property acquired by federal agencies does not supersede the authority and direction contained in Section 16 of the Merchant Marine Act, 1920, as amended (U. S. C., Title 46, Sec. 874), respecting the disposition of properties acquired during the World War period for housing purposes.

DEPARTMENT OF JUSTICE,
May 20, 1936.

SIR: I have your letter of May 15 with further reference to the Act of August 27, 1935, c. 744, 49 Stat. 885, entitled "An Act to provide for the disposition, control, and

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use of surplus real property acquired by Federal agencies, and for other purposes."

In my opinion to you of April 17, 1936, I concluded that this statute did not affect the provision contained in Section 16 of the Merchant Marine Act, 1920, as amended (U. S. C. Title 46, Sec. 874), authorizing and directing the disposition of properties acquired during the World War for housing employees of the United States, as applied to properties which had been made the subject of contracts of sale prior to the passage of the later Act.

You now state that there are a number of other parcels of real property similarly acquired during the World War period by the United States or by corporations owned and controlled by the United States and equally affected by Section 16 of the Merchant Marine Act, as amended, but not subject to existing contracts of sale although you point out that "most of these properties were * * * sold by the United States and/or the various corporate owners which in turn were owned by the United States, and mortgages thereon taken back in favor of the United States, and the United States now has possession of the properties which were taken over again on defaults of the mortgagors." It further appears that your Department is presently considering a definite offer from a prospective purchaser of one parcel, that some others have been the subject of negotiations or inquiries, and that all are held for sale when buyers at fair prices may be found, unless your authority to dispose of them has been superseded.

In connection with the property affected by the contract with the Brooklawn Housing Corporation, considered in my opinion of April 17, 1936, the view was expressed both by the Solicitor of your Department and by the Director of Procurement of the Treasury Department, to whom the matter was referred by you because of his possible interest under the Act of August 27, 1935, that this Act and Section 16 of the Merchant Marine Act dealt with different subject matters and that therefore the later Act did not supersede the other. My opinion was based upon the narrower ground hereinbefore indicated, which was sufficient for the disposition of the particular case then submitted to me.

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I am in accord, however, with the views thus expressed by your Solicitor and by the Procurement Division of the Treasury Department. Section 16 of the Merchant Marine Act specifically directed the disposition of the housing properties acquired during the World War. The Act of August 27, 1935, on the other hand, authorized the assignment to other public use of properties held by a particular federal agency and administratively determined to be in excess of its needs, and authorized the discretionary lease or sale of such property if, *semble*, other public need should not appear.

It is, therefore, my opinion that the Act of August 27, 1935, does not supersede the authority and direction contained in Section 16 of the Merchant Marine Act, 1920, as amended, respecting the disposition of properties acquired during the World War period for housing purposes.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF COMMERCE.

STATUTORY DISABILITY OF ARMY OFFICER CONVICTED OF CRIME

Colonel Joseph I. McMullen, Judge Advocate General's Department, United States Army, was convicted in the Supreme Court of the District of Columbia of violating Section 203, Title 18 of the United States Code, which provides, in part, that a person convicted thereunder shall be fined and imprisoned "and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States". Colonel McMullen appealed from the judgment of conviction and was admitted to bail.

Held: The appeal did not stay the disqualification provision of the statute, and upon the entry of judgment and sentence Colonel McMullen, under the statute, became immediately incapable of holding any office of honor, trust, or profit under the Government of the United States.

DEPARTMENT OF JUSTICE,
May 21, 1936.

SIR: I have your letter of May 13, 1936, in which you request my opinion as to the present military status of Colonel Joseph I. McMullen, Judge Advocate General's

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Department, United States Army, in the light of the facts hereinafter set forth.

It appears from a certified copy of the proceedings in the case of *The United States* v. *Joseph I. McMullen* in the Supreme Court of the District of Columbia, which accompanied your letter, that Colonel McMullen was convicted April 30, 1936, for violating Section 203, Title 18 of the United States Code (Criminal Code, Sec. 113). Motions in arrest of judgment and for a new trial were overruled on May 8, 1936, on which date he was sentenced to be imprisoned in the Washington Asylum and Jail for a period of six months and to pay a fine of $1,000; whereupon the defendant filed a notice of appeal and upon furnishing a bond in the sum of $2,000 was admitted to bail. Judgment was entered accordingly.

Section 203, Title 18, U. S. C., provides:

"Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; "and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States." (R. S. § 1782; Mar. 4, 1909, c. 321, § 113, 35 Stat. 1109.)

The defendant's notice of appeal, under Rule V of the Rules of Practice and Procedure, promulgated by the United States Supreme Court May 7, 1934 (292 U. S. 661, 663), had the effect of staying the execution of the judgment of conviction against the defendant pending his appeal. It is to be noted, however, that the statute does not specifically

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prescribe that the disqualification shall become effective either upon a verdict of guilty or upon a judgment of conviction but merely directs that any person who has committed the prohibited acts shall be fined and imprisoned and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States". Since conviction by a court of competent jurisdiction is necessarily precedent to or contemporaneous with fine and imprisonment the words "by conviction therefor", which were eliminated by the codifiers when Section 1782 of the Revised Statutes was reenacted as Section 113 of the Criminal Code (1909), were superfluous. It is clear that the word "thereafter" in the statute does not refer to the time when the prohibited compensation is received, or to the time when a verdict of guilty is rendered; it can refer only to the time of judgment of conviction and pronouncement of sentence of fine and imprisonment. *Kurtz* v. *Moffitt*, 115 U. S. 487, 501; 24 A. L. R. 1290.

In *Burton* v. *United States*, 202 U. S. 344, 369 (1906), the United States Supreme Court indicated that the disqualification under Section 203, *supra*, was self-executing, following a conviction under the statute, and was not a part of the judgment of the court. However, since the statute does not disclose a clear expression of the intent of Congress as to when disqualification becomes effective, the effect of the provision must be determined in accordance with judicial construction.

Although the question as to whether an appeal has the effect of staying the disqualification provision of Section 203, *supra*, has not been decided by any federal court, similar provisions in state statutes and constitutions have been considered by the highest courts of several states, which have uniformly held that disqualification is not a part of the punishment but is an incidental consequence and becomes effective upon the judgment of conviction notwithstanding appeal. *State ex rel. Olson* v. *Langer*, 256 N. W. 377 (Supreme Court, North Dakota); *McKannay* v. *Horton*, 91 Pacific 598 (California); *In Re Obergfell*, 145 N. E. 323 (New York); *State* v. *Levi*, 153 S. E. 587 (West Virginia).

In the case of *State* v. *Langer*, *supra*, it appears that the respondent, then Governor of the State of North Dakota,

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was convicted of an offense which was a felony under federal statutes. The Constitution of North Dakota contained a provision that no person should be eligible to the Office of Governor unless, among other things, he was a qualified elector of the State, and another provision disqualified any person convicted of treason or felony for voting at any election unless restored to civil rights. Accordingly, the Lieutenant-Governor brought *quo warranto* proceedings to compel the defendant to vacate the Office of Governor. One of the defenses set up by the respondent was that his appeal from conviction in the federal court superseded whatever disqualification resulted from such conviction. In rejecting this contention the court said:

"In considering the merits of this contention, we must bear in mind the purpose underlying the constitutional disqualification and the nature of the consequences that result from it. As we have shown, the purpose is the protection of the public; the disqualification is an incidental consequence, and not a punishment or penalty.

"When a person is convicted of a felony, the presumption of guilt immediately attaches, and this presumption is not destroyed or abrogated by an appeal. It is against public policy and against the best interests of sound government that one convicted of a felony shall continue to exercise his right to the elective franchise and to enjoy the privileges and prerogatives of an elector. The rights of the public must be paramount to the rights of the individual. And the right of the individual to participate in government as an elector must give way to the public interest, so that the public may know that the purity of the ballot box is insured and thus have confidence in the honor and rectitude of its officials. It is true that this may work a hardship upon the individual because it is possible his conviction may be reversed upon appeal and ultimately he may be found innocent; and therefore some may believe that in a sense he was wrongfully deprived of his enjoyment of the elective franchise and the privileges which go with it. But, on the other hand, his conviction may be affirmed (presumptively it will be), and we would have the anomalous situation of an individual holding the great office of Governor of a state found by the jury to be guilty of a felony

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and sentenced to a federal penitentiary, yet continuing during the pendency of his appeal to be and to act as the chief executive of the state, intrusted with the enforcement of the Constitution and the laws, as well as having the personal and private right to enjoy the rights, duties, privileges, honors, and emoluments of his great office. If an appeal allowed and permitted a citizen convicted of a felony to retain the rights and privileges of an elector, including the right to hold office during the interval of his appeal, the object of the statute and the Constitution would, in most cases, be wholly defeated; because, as a matter of common knowledge, appeals take time. They sometimes occupy months or years, and hence a convicted elector would, if an officer, in most instances serve out his complete term and might even be re-elected during the pendency of his appeal, though judgment of conviction should be ultimately affirmed. Hence the public would have no redress, and its rights would be entirely overlooked and ignored."

In *McKannay* v. *Horton*, *supra*, the court said:

"An official who is declared insane is simply unfortunate; but he ceases to be an official. An innocent man who is unjustly convicted of a felony is doubly unfortunate; but the fact that he may by means of an appeal ultimately succeed in establishing his innocence does not entitle him in the meantime to hold on to a public office which he is no more capable of serving than if he were insane. The law allows an appeal from a conviction of felony because, so far from being against the public interest, it is promotive of the public interest that a person accused of crime should have every reasonable opportunity of vindicating his innocence. But, if the person so convicted is the incumbent of a public office, these considerations do not weigh in favor of retaining him in that position pending an appeal. The pendency of the appeal does not affect the presumption of guilt, which arises inmmediately upon the rendition of the verdict. * * * The only effect of an appeal and certificate of probable cause is to stay the execution of the judgment. Removal from office is not part of the judgment of conviction in cases of felony, though a consequence which flows from it. * * *"

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In the case of *In Re Obergfell*, *supra*, The Court of Appeals for the State of New York, of which Mr. Justice Cardozo of the Supreme Court of the United States, Chief Justice Hiscock, and Associate Justice Pound were then members, cited with approval *McKannay* v. *Horton*, *supra*, and said (239 N. Y., p. 50):

"The argument is made that the certificate of reasonable doubt, by staying the execution of the judgment, has stayed also the creation of a vacancy, or, if a vacancy exists, the right to fill it. We read the statute otherwise. The abridgment of the term upon the conviction of the incumbent is not a punishment for his offense. *Matter of Rouss*, 221 N. Y. 81, 116 N. E. 782. It is an automatic limitation upon the duration of his office. *McKannay* v. *Horton*, 151 Cal. 711, 91 P. 598, 13 L. R. A. (N. S. 661, 121 Am. St. Rep. 146.) The application of the statute is not defeated by the possibility that the judgment may be reversed. That possibility would be present though a certificate had not been granted and the incumbent were in jail. The statute does not mean that a vacancy shall exist in those cases, and those only, where the incumbent is subjected to physical restraint. Its meaning is that one convicted of a felony shall not retain a post of honor. *McKannay* v. *Horton*, *supra*." (145 N. E. 323)

In *State* v. *Levi*, *supra*, the Supreme Court of West Virginia said (p. 588):

"The robe of innocence with which the law invested Mr. Camp during trial was stripped from him by the verdict of the jury. The judgment of the court has put upon him the garb of guilt. A legal as well as laical presumption has now arisen that his conviction is just * * *. It is essential to our government that public officials have the confidence of the people. That confidence cannot extend to an official under conviction for malfeasance in office. His rights are subordinate to the public weal. The possibility that his conviction may ultimately be reversed cannot weigh against public dissatisfaction with, and public mistrust of him pending appellate hearing. Public policy demands a rigid construction of this law as well as its rigid enforcement. With pitiless propriety the Supreme Court of Vir-

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ginia said, that when the people established the Constitution they never intended that a public office 'should be contaminated by the presence of a convicted * * * felon'." (256 N. W. 391)

It appears that all the leading authorities on the question were discussed by the Supreme Court of North Dakota in the *Langer* case, *supra*, and the principal cases relied upon by the respondent were rejected as inapplicable with the exception of the advisory opinion to the Governor of Florida, reported in 75 Fla. 674; 78 Southern 673, 674, which it rejected by reason of the fact that the court stated no reasons or authorities in support of its contrary view.

The decisions of the state courts above referred to are based upon sound principles of law and public policy and should be followed in construing the statute under consideration. Any hardship that may result to the individual as a result of such construction becomes real only in the event the reversal of his conviction is secured, but the injury and detriment to society and to the public service is a certain and immediate result of the retention in office, even temporarily, of a person convicted of crime.

For the foregoing reasons it is my opinion that upon the date of the entry of the judgment of conviction and sentence of Colonel McMullen under Section 203, *supra*, he became immediately incapable of holding any office of honor, trust, or profit under the Government of the United States.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

AUTHORITY OF ADMINISTRATOR OF VETERANS AFFAIRS TO CONSENT TO ABANDONMENT OF HIGHWAY.

The Administrator of Veterans' Affairs is without authority to consent for the United States to the abandonment of a certain highway, one section of which traverses and another of which constitutes a portion of the boundary of the Veterans' Administration Facility at Bath, Steuben County, New York; and, under the circumstances, it would seem that only the Congress can legally give such consent.

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DEPARTMENT OF JUSTICE,
May 22, 1936.

SIR: Reference is made to your letter of March 13, 1936, in which you request my opinion as to whether you are legally authorized to consent to the abandonment of a certain highway, one section of which traverses and another of which constitutes a portion of the boundary of the Veterans' Administration Facility at Bath, Steuben County, New York.

From your letter and the accompanying documents, the following facts appear. The premises now known as the Veterans' Administration Facility (formerly the State Camp for Veterans) were conveyed to the United States in fee simple by the State of New York by deed dated January 24, 1933, the conveyance being made pursuant to an Act of the New York Legislature approved March 17, 1932 (c. 235, Laws of New York, 1932). No mention of the highway is made in the deed of conveyance.

Forming a part of the highway within the bounds of the Facility is a bridge over the Conhocton River. That portion of the highway on which the bridge is built is the main approach to the buildings on the Facility property.

It appears that the officials of Steuben County desire to abandon the highway and bridge; that under the procedure being followed by them, it is deemed necessary to obtain the consent of all abutting landowners in order to effect a legal abandonment; and that you have been requested to consent, for the United States, to the proposed abandonment and to the entry of an order to effect it in a court of competent jurisdiction.

As a general rule, the title to land dedicated to the uses of a public highway does not vest in the state but remains in the abutting landowners. *Harris* v. *Elliott*, 10 Pet. 25; *Barclay* v. *Howell*, 6 Pet. 498; *Kansas Natural Gas Co.* v. *Haskell*, 172 Fed. 545. This is the New York rule. *Eels* v. *A. T. & T. Co.*, 143 N. Y. 133; *Bloomfield, etc., Gas Light Co.* v. *Calkins*, 62 N. Y. 387; *Munn* v. *Worrall*, 53 N. Y. 44. Hence, the United States has title to all of the land over which the road passes within the confines of the Facility and title to one-half, or to the midline, of the portion of the

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highway forming a part of the boundary of the Facility, subject, of course, to the easement of the public.

If the highway is abandoned, the easement of the public therein will be extinguished, and the United States may use the land to which it has title for whatever purposes it desires, including, of course, that of a private road. However, the easement of the United States in the highway beyond the confines of the Facility is a vested right, which I do not find you authorized to surrender. It is immaterial that the benefits which would flow from the abandonment might outweigh the value of the easement surrendered, for this is a matter not within your discretion to determine. Unless otherwise provided, it is for the Congress to determine whether such rights of the United States as are here involved shall be surrendered, and it would seem that, since no other provision has been made as to the matter under consideration, only the Congress can legally give the desired consent of the United States.

In compliance with your request the papers submitted with your letter are herewith returned.

Respectfully,

HOMER CUMMINGS.

To Administrator of Veterans' Affairs.

STATUS OF GREAT BRITAIN AS A RECIPROCAL COUNTRY UNDER THE MINERAL LEASING ACT OF FEBRUARY 25, 1920

Great Britain is to be regarded as a reciprocal country under the provisions of the Mineral Leasing Act of February 25, 1920, conditioned upon the assumptions herein stated concerning the applicable British statutes and regulations.

Department of Justice,
May 25, 1936.

Sir: I have the honor to comply with your request of April 25 for my opinion upon a question requiring interpretation of the Mineral Leasing Act, approved February 25, 1920, c. 85, 41 Stat. 437, 438 (U. S. C., Title 30, Sec. 181), and arising in connection with the following inquiry, addressed to the Secretary of State by the British Ambassador.

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"I am directed by His Majesty's Principal Secretary of State for Foreign Affairs to inform you that the Secretary for Mines has received from the * * * Oil Company a number of applications for oil prospecting licences under the Petroleum (Production) Act, 1934, covering in the aggregate several hundred square miles. The * * * Oil Company, which is controlled by the * * * Corporation of New York, have also expressed their desire to have assigned to them in due course a licence which has been applied for jointly by two British nationals, and which it is expected will shortly be issued to them.

"2. This Petroleum (Production) Act, 1934, vested in the Crown the property in petroleum existing in its natural condition in strata in Great Britain and gave power to the Board of Trade to grant licences to search for and get petroleum under the conditions contained in Regulations to be made under Section 6 of the Act. * * *

"3. With regard to the question of the nationality of applicants or licensees, the following is the substance of the main provisions of the Regulations:

"(a) In the case of aliens and Companies incorporated outside Great Britain or Northern Ireland it is a condition that an operating Company must be formed and registered in Great Britain or Northern Ireland for the purpose of receiving the grant of, and exploiting, any licence (Regulation 2 (3)).

"(b) The Licensee may not assign the rights granted by the licence to any person other than a British subject or a Company incorporated in Great Britain or Northern Ireland (page 9—'Assignment of Licence').

"(c) In the event of a licensee being controlled by an alien or a Company incorporated outside Great Britain or Northern Ireland, or if a licence is assigned to a foreign controlled Company at least one of the Directors of the Company and a majority of the persons employed in connection with operations under the licence must be British subjects ('Special clause' on pages 10 and 11).

"(d) A licence may only be held by nationals of those countries, the laws and customs of which accord comparable rights to British nationals (page 11).

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"4. The Secretary for Mines is prepared to grant the licences for which the * * * Oil Company has applied, subject to the completion of formalities and to his being satisfied on the question arising on '(d)' above. For this purpose it will be necessary to ascertain the present position regarding the grant of oil concessions in the United States to persons who are not nationals of that country.

* * * * *

"6. I am therefore directed to enquire whether, having regard to the new Regulations now in force in Great Britain, that country is regarded, under the Mineral Leasing Act, 1920, as a reciprocal country, so as (in the wording of the 'Special clause') to permit British subjects or Companies incorporated in Great Britain or Northern Ireland or Companies incorporated in the United States controlled directly or indirectly by British subjects or Companies incorporated in Great Britain or Northern Ireland to acquire, hold and operate petroleum concessions, where the grant of such concessions is within the power, or subject to the approval of, the United States Government, on conditions which are reasonably comparable with the conditions upon which such rights are granted to nationals of the United States with the addition of conditions corresponding to those imposed by the clause entitled 'Special clause'."

The Petroleum (Production) Act (July 12, 1934, 24 & 25 Geo. 5, c. 36; Halsbury's Statutes of England, v. 27, p. 442) contains no express provision regarding the issuance of licenses to aliens. Section 2 authorizes the Board of Trade to grant licenses to "such persons as they think fit," and Section 6 requires the Board to prescribe by regulation "the manner in which and the persons by whom" applications for licenses may be made. Under the latter section the regulations are required to be laid before each House of Parliament, with power in either House to annul them by resolution within twenty-eight days.

Therefore the matter is controlled by the regulations, apparently of statutory force. I quote below the pertinent portions of the regulations, which are paraphrased and interpreted (in part) in the Ambassador's communication.

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"An application by an alien or a company incorporated outside Great Britain or Northern Ireland shall contain * * * full particulars of any company intended to be incorporated in Great Britain or Northern Ireland for the purpose of receiving the grant of and exploiting any Licence which may be granted in pursuance of the application."

"*Assignment of Licence.*—The Licensee shall not assign or attempt to assign the rights granted by this Licence to any person other than a British Subject or a Company incorporated in Great Britain or Northern Ireland."

"*Special Clause.*—(1) If—

"(a) the Licensee, being a company, shall be or become controlled directly or indirectly by an alien or a company incorporated outside Great Britain or Northern Ireland; or

"(b) the Licensee shall, with the consent in writing of the Board, assign the rights granted by this Licence in respect of the licensed area or any part thereof to a company controlled directly or indirectly by an alien or by a company incorporated outside Great Britain or Northern Ireland;

then and in any such case the following provisions shall apply:

"(a) At least one of the directors shall be a British Subject.

"(b) At all times during the term hereby granted or any renewal thereof a majority of the persons employed by the Licensee in or about the licensed area in connection with the exercise of the rights granted by this Licence shall be British Subjects."

"(2) This Licence shall be determined if the Licensee shall be or become controlled directly or indirectly by a national of or by a Company incorporated in any country the laws and customs of which do not permit British Subjects or Companies incorporated in Great Britain or Northern Ireland or Companies incorporated in that country controlled directly or indirectly by British Subjects or Companies incorporated in Great Britain or Northern Ireland to acquire hold and operate petroleum concessions on conditions which in the opinion of the Board are reasonably comparable with the conditions upon which such rights are granted to nationals of that country with the addition of conditions

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corresponding to those imposed by this Clause." (S. R. & O. 1935, p. 1360).

Your Department has adopted the tentative view that Great Britain is a reciprocal country within the contemplation of the Mineral Leasing Act, and you so informed the Secretary of State, in response to an inquiry, but suggested that the matter should be referred to me, and you have now requested my opinion.

The applicable provision of the Act of February 25, 1920, is contained in Section 1 thereof, which reads as follows:

"That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further, That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.*" [Italics supplied.]

This statute authorizes the granting of leases to American citizens and corporations, but recognizes the fact that stock in such corporations may be held by nationals of foreign countries, and forbids it only as applied to citizens (includ-

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ing corporations) of other countries whose laws, customs or regulations deny similar or like privileges to citizens or corporations of this country.

The British requirements are generally comparable in that, while they appear to authorize the holding of licenses only by British subjects and corporations, they permit stock ownership in such corporations by citizens and corporations of countries which accord comparable rights to British nationals.

Our statute contains nothing corresponding with the provision of the British regulations that, in the case of corporations controlled by aliens, at least one of the directors shall be a British subject and a majority of the persons employed in or about the licensed area shall be British subjects, but I do not regard the British requirements in this respect as affecting the status of Great Britain as a reciprocal country within the contemplation of the statute. The requirements are not unduly restrictive or harsh, and some such provisions, particularly with respect to directors, may be found in the corporation laws of our States.

The state laws have no direct connection with the right to remove mineral deposits from the public domain of the United States, but have a practical bearing to the extent that persons who invoke the laws of a particular State must meet the requirements of those laws, at least in matters relating to organization and affecting the right to exist as a body corporate. To undertake an examination of the corporate organization laws of the several States and Territories in this connection would be impracticable and would serve no useful purpose. They are either restrictive or liberal in varying degrees and in different particulars, but a corporation organized under any of them may obtain a lease under the Federal statute.

The legislative history of the Mineral Leasing Act has been examined, but nothing therein warrants particular mention. I have also inquired into the practice during the sixteen years that the Act has been effective and find that the question of eligibility of nationals of particular countries has received the attention of the Department of State and of the Department of the Interior in only a limited

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number of instances. The question does not appear to have arisen heretofore in connection with nationals of Great Britain, as distinguished from nationals of outlying portions of the British Empire. Leases have been issued to corporations controlled by citizens of some of the Provinces of Canada, but involving statutes other than the British Petroleum (Production) Act. It is sufficient to say that no ruling heretofore made and brought to my attention bears adversely upon the question of the status of Great Britain as a reciprocal country under the Mineral Leasing Act.

Considering the foregoing, it is my opinion that Great Britain is to be regarded as a reciprocal country under the provisions of the Mineral Leasing Act of February 25, 1920, provided that the Petroleum (Production) Act and the regulations made thereunder are so construed and applied by the British authorities as to permit participation by American citizens and corporations under conditions no less favorable than those hereinbefore indicated, based upon my understanding of the statute and regulations and the statements of the British Ambassador, and assuming that the matter is not adversely affected by other British statutes, regulations, or amendments which have not come to my attention or may hereafter be adopted.

I am sending a copy of this opinion to the Secretary of State because of his interest and since he also has submitted the matter for my consideration.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

RIGHT OF THE UNITED STATES TO CUMULATIVE PREFERRED DIVIDENDS ON STOCK OF FEDERAL HOME LOAN BANKS

Under Section 6 (k) of the Federal Home Loan Bank Act of July 22, 1932, as amended by Section 2 of the Act of May 28, 1935, c. 150, 49 Stat. 293, the United States is not entitled to the payment of preferred dividends on stock of Federal Home Loan Banks accumulated to the date of the amendatory act, and all stock of any bank is entitled to share in all dividends declared and paid subsequent to that date without preference.

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DEPARTMENT OF JUSTICE,
May 28, 1936.

SIR: I have the honor to comply with your request of May 1, 1936, made in behalf of the Federal Home Loan Bank Board, for my opinion upon the question hereinafter stated.

The Federal Home Loan Banks were established pursuant to Section 3 of the Federal Home Loan Bank Act of July 22, 1932 (47 Stat. 725, 726). As originally enacted, Section 6 (k) of that Act provided:

"All stock of any Federal Home Loan Bank shall share in dividend distributions without preference, except that stock subscribed for by the United States shall be entitled to dividends at a rate of 2 per centum per annum cumulative from the date of investment but in any case in which the rate of dividend is in excess of 2 per centum, the stock subscribed for by the United States shall be entitled to dividends at a rate not in excess of that paid on other stock."

This section was amended by Section 2 of the Act of May 28, 1935, c. 150, 49 Stat. 293, to read as follows:

"All stock of any Federal Home Loan Bank shall share in dividend distributions without preference."

While some of the Federal Home Loan Banks have paid dividends of 2% on all stock owned by the Government from the dates of investment to May 28, 1935, the date of the amendatory Act, others have paid only a portion of such dividends, the rates paid varying with the different banks and for different periods of time.

The question upon which my opinion is desired is stated as follows by the Chairman of the Federal Home Loan Bank Board in his letter to you of April 29, 1936:

"Upon the declaration of dividends by Federal Home Loan Banks after May 28, 1935, are such dividends to be declared to the Government as a stockholder and to other stockholders without preference and without regard to whether such Bank has paid a 2 per cent cumulative dividend to the Government from the date of investment by the Government to May 28, 1935?"

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There is no question that under the original Act the banks were required to pay dividends at the rate of 2% per annum on all stock owned by the United States for the whole time subsequent to the date of investment before making payment of any dividends on the other, or common, stock. It is clear, also, that under the Act as amended the banks are not required to pay preferred dividends for any period of time subsequent to May 28, 1935, the date of the amendment. The sole question is whether the United States is now entitled to the payment of preferred dividends accumulated to May 28, 1935. The answer to this question depends, of course, upon the meaning and effect of the amendment.

Under the original Act, the United States as a preferred stockholder had a vested right to the payment of the specified cumulative dividends before payment of any dividends on the common stock. *Roberts* v. *Roberts-Wicks & Co.*, 184 N. Y. 257; *Morris* v. *American Public Utilities Co.*, 122 Atl. 696, 703; *Colgate* v. *U. S. Leather Co.*, 73 N. J. Eq. 72, 96. However, the United States was not a creditor of the banks and had no right to demand payment of dividends on its stock unless and until such dividends were actually declared. *American Steel Foundries* v. *Lazear*, 204 Fed. 204, 210; *Chaffee* v. *Rutland Railroad Co.*, 55 Vt. 110; *Belfast, etc. Co.* v. *City of Belfast*, 77 Me. 445. Dividends are at all times to be distinguished from surplus or undivided profits from which dividends are paid. Whether or not dividends shall be declared rests with the discretion of the board of directors of the corporation, although such discretion must not be abused. *Storrow* v. *Texas, etc., Assn.*, 87 Fed. 612. Accurately speaking, dividends do not exist until they are declared.

It will be noted that Section 6 (k) as originally enacted consisted of two distinct clauses, the first of which wholly prohibited dividend preferences and the second of which, by way of exception, limited the prohibition by providing for cumulative preferred dividends on stock owned by the United States. The amendment of the section was accomplished by striking out the excepting clause, so that the section as amended consists only of the first clause: "All

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stock of any Federal Home Loan Bank shall share in dividend distributions without preference."

An amended statute is construed, with respect to any action taken subsequent to the enactment of the amendment, as if the statute had been originally enacted in the amended form. *Blair* v. *City of Chicago*, 201 U. S. 400, 475; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 362; *United States* v. *La Franca*, 282 U. S. 568, 576; Endlich on Statutes, Sec. 294; Sutherland on Statutory Construction, Sec. 237. In this instance, it is apparent that if the statute had been originally enacted in the amended form, no dividends ever could have accumulated. Hence, under the stated rule of construction, the amendment, operating *ab initio*, precludes any right of the United States to any preferred dividends accumulated to May 28, 1935, so that any declaration and payment of dividends subsequent to that date must be made without regard to any such accumulated dividends.

The manifest purpose of the amendment is to relieve the banks of the obligation to pay preferred dividends; and there would seem to be no reason to suppose that the Congress intended to limit such relief, as would be the consequence of requiring the banks to pay any preferred dividends accumulated to the date of the amendment. In any event, there is nothing in the amendment to indicate such an intention on the part of the Congress. On the contrary, the language of the amendment evinces a purpose to prohibit, from its date, distribution of preferred dividends of any kind, and to whatsoever period of time allocated.

The fact that the amendment bars the payment of dividends accumulated to a time prior to its enactment does not render it retrospective. An analogous situation is found in *Reynolds* v. *United States*, 292 U. S. 443. That case involved the construction of the following proviso inserted in Section 9 of the Act of July 2, 1926, 44 Stat. 794, as an amendment to Section 202 (10) of the World War Veterans Act of 1924:

"That the pension of a veteran entitled to hospitalization under this subdivision shall not be subject to deduction, while such veteran is hospitalized in any Government hospital, for board, maintenance, or any other purpose incident to hospitalization."

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The petitioner was confined to a Government hospital from 1911 to 1930. Upon his discharge, the hospital deducted a certain amount from his pension funds on account of board furnished him during the period of his confinement, and the suit was to recover the amount so deducted. The Government contended that, in any event, the petitioner was not entitled to recover that portion of the deduction applicable to the charge for board furnished prior to July 2, 1926, the date the proviso was enacted, since to allow such recovery would be to give the proviso a retroactive operation contrary to the intention of Congress. In allowing recovery in full the Court held that the proviso was intended to relieve the pensions of veterans from liability to answer for hospitalization debts existing prior to the date of enactment of the proviso as well as those incurred subsequent thereto and that it prohibited deductions on account of such debts. The Court further held that the allowance of that portion of the amount sued for which was applicable to board furnished prior to July 2, 1926, did not cause the proviso to operate retroactively, stating (p. 449) "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." See also *Cox* v. *Hart*, 260 U. S. 427, 435.

As I interpret the amendment, it relates to the payment or distribution of dividends and does not distinguish between classes of dividends or dividend periods. Since it applies only to future payments of dividends it is prospective, and not retrospective. Of course, the Congress had the power to surrender the right of the United States to dividends accumulated to the date of the amendment, as well as to those accumulated thereafter; and, in my opinion, the language used is appropriate to surrender that right—particularly in view of the principle of construction set forth above. If the Congress had wished to preserve the right of the Government with respect to such dividends, it easily could have chosen language defining that purpose.

Since some banks have paid a greater percentage of preferred dividends than others, it may seem that the construction which I have given the amendment produces inequality and injustice. But this is more apparent than real.

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The amendment does not affect past payments. In any event no bank which has paid preferred dividends is, or can be, injured in any respect because another has not done and is not obliged to do so. At most some banks may be benefited more than others; but no bank is benefited at the expense of another.

Although I do not think resort need be had to the legislative history of the amendment to determine its meaning and effect, its history, if it may properly be considered, seems to corroborate the view which has been expressed.

The only explanation given in the Committee Reports of the amendatory section is contained in Senate Report No. 438, 74th Cong., 1st Sess., at page 2. It is as follows:

"Section 2, which corresponds to section 2 of the House bill, amends the Federal Home Loan Bank Act, so as to provide that payment of dividends on stock of the Federal home-loan banks will be without preference. This, in effect, removes the preference given under the present law to the stock held by the United States."

It will be noted that the report interprets the amendment as requiring that the "payment" of dividends shall be without preference, and as removing the preference of the United States under the original Act.

The explanations given of the section on the floor of the House are even more enlightening. Representative Hollister, a member of the Committee on Banking and Currency, which had charge of the bill, made the following explanation of the section (Cong. Rec., 74th Cong., 1st Sess., Vol. 79, Part 3, p. 3141):

"Section 2 provides that there shall be no preference respecting the dividends on stock of the home-loan banks. The law now provides that the Government shall have a 2-percent cumulative dividend on the stock in the banks to which it has subscribed. The Board feels that there are one or two banks in such a condition it would perhaps be unwise to pay any dividends, certainly not 2 percent, but in a desire not to have the Government's stock in arrears they are trying to pay 2 percent when nothing, or at most 1 or 1½ percent would be more proper. Inasmuch as it is a small matter, the Federal Government having 80 percent

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of the stock of the banks, it would be wise to eliminate that provision."

This explanation indicates a purpose of the amendment to extinguish entirely the right of the Government to preferences in the payment of dividends. The statement that "The Board feels that there are one or two banks in such a condition it would perhaps be unwise to pay any dividends" points to an intent to relieve the banks of the duty of paying dividends referable to any time prior to the enactment of the amendment.

The section in question is further explained by Representative Hancock, also a member of the Banking and Currency Committee, as follows (Cong. Rec., 74th Cong., 1st Sess., Vol. 79, Part 3, p. 3152):

"Section 2 amends the Federal Home Loan Bank Act by taking away the preference as to accumulated dividends on stock in the Federal home-loan banks owned by the Federal Government. The original act provided for a 2-percent cumulative dividend, and, in addition, the Government stock was to receive the same dividends as stock owned by member institutions if the rate of dividend exceeded 2 percent. Under this amendment all stock will be on the same basis as to earnings and other qualities."

It is significant that in this explanation it is expressly stated that the amendment extinguishes the preference as to *accumulated* dividends on the stock owned by the Government, and also that under the amendment all stock will be on the same basis as to earnings and other qualities.

For these reasons, it is my opinion that the United States is not entitled to the payment of preferred dividends accumulated to May 28, 1935, and that all stock of any bank is entitled to share in all dividends declared and paid subsequent to that date without preference.

Respectfully,

JOSEPH B. KEENAN,
Acting Attorney General.

To the PRESIDENT.

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IMPOSITION OF COUNTERVAILING DUTIES ON IMPORTS FROM GERMANY

The practices and devices of the German government described herein constitute the paying or bestowing of bounties or grants within the meaning of Section 303 of the Tariff Act of 1930; and the Secretary of the Treasury is required under that Act to impose countervailing duties upon articles imported from Germany in respect of which bounties or grants are paid or bestowed by reason of such practices and devices.

The Treasury Decision proposed to be issued by the Secretary of the Treasury is within the requirements of the said Section 303, and its form is appropriate for carrying out the mandate of that statute.

DEPARTMENT OF JUSTICE,
June 2, 1936.

SIR: Responding to your request for my opinion as to a Treasury Decision which you propose to issue giving notice of the imposition under Section 303 of the Tariff Act of 1930 of countervailing duties on certain imports from Germany, I have given careful consideration to the matter in the light of documents received from you, including the opinion of the General Counsel for the Treasury Department, which reaches the conclusion that the statute requires that the proposed action be taken. You state also that you are satisfied, under the circumstances, that you have no choice other than to follow that course. The legal conclusions at which I arrive are based upon a somewhat complicated factual situation which it is necessary to set forth in some detail.

Section 303 of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, 46 Stat. 590, 687; U. S. C., Sup. VII, Title 19, Sec. 1303) provides as follows:

"Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether

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the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

Briefly, the question is whether Germany, by reason of the use of certain procedures or devices, must be held under this section of the Tariff Act of 1930 to "*pay or bestow, directly or indirectly, any bounty or grant* upon the manufacture or production or export" of certain dutiable articles or merchandise manufactured or produced in that country. If so, the Act provides that upon importation of such articles into the United States "there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of *such bounty or grant, however the same be paid or bestowed.*" The Act requires that "the Secretary of the Treasury *shall* from time to time ascertain and determine, or estimate, the net amount of each such *bounty or grant*, and *shall* declare the net amount so determined or estimated," empowering him to make all regulations which he may deem necessary for identifying such articles and assessing and collecting such additional duties. It will thus be observed that the duties of the Secretary of the Treasury under the Act are mandatory. Therefore, if in fact Germany does "*pay or bestow, directly or indirectly, any bounty or grant*" upon the manufacture or production or export of such articles, the Secretary must levy and collect "an additional duty equal to the net amount of *such bounty or grant, however*

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the same be paid or bestowed." The inquiry is whether the practices being pursued by Germany respecting exports to this country constitute bounties or grants within the statute, the comprehensive language of which has just been indicated by italics. It is obvious from the language itself that the scope of the Act is very broad. The Supreme Court has said of the same language in the Tariff Act of 1913 (Act of October 3, 1913, c. 16, 38 Stat. 114):

"The statute was addressed to a condition and its words must be considered as intending to define it, and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise" a countervailing duty is required by Paragraph E." (*Nicholas & Co.* v. *United States*, 249 U. S. 34, 39.)

It is plain from the statute itself that it was intended to anticipate as inclusively as possible all practices and devices which might be resorted to or invented to circumvent it by obscuring or concealing their purposes as bounties or grants. The history of the Act fully corroborates its purposes to make impossible its evasion by indirection or disguise. (See *Nicholas & Co.* v. *United States*, 7 Ct. Cust. Appls. 97.) In that case Great Britain paid certain amounts as "compensation" in addition to the remission of inland revenue taxes upon exportation of liquor to the United States. Countervailing duties equal to the net amount of the "compensation" were imposed and the imposition was sustained by the Supreme Court, which after using the language quoted above said:

"We have the fact of spirits able to be sold cheaper in the United States than in the place of their production, and this the result of an act of government because of the destination of the spirits being a foreign market. For that situation Paragraph E was intended to provide." (pp. 39–40.)

In the decision of the Court of Customs Appeals in the same case (*Nicholas & Co.* v. *United States*, 7 Ct. Cust.

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Appls. 97), that court, after commenting upon the clarity of the language and purpose of the statute, said:

"There is nothing obscure, abstruse, mystic, or even ambiguous about this language, which has been, as to the particular words, a part of all our tariff acts from 1897 to and including the present act. Section 5, tariff act of 1897 (30 Stat. L., 151), section 6, tariff act of 1909 (36 Stat. L., 11), paragraph E of section 4, tariff act of 1913 (38 Stat. L., 114). Its plain, explicit, and unequivocal purpose is: Whenever a foreign power or dependency or any political subdivision of a government shall give any aid or advantage to exporters of goods imported into this country therefrom whereby they may be sold for less in competition with our domestic goods, to that extent by this paragraph the duties fixed in the schedule of the act are increased. It was a *result* Congress was seeking to equalize regardless of whatever name or in whatever manner or form or for whatever purpose it was done. The statute interprets itself as a member of an act calculated to maintain an accorded protection, incidental or otherwise, as against payments or grants of any kind by foreign powers, *resulting* in an equalization thereof to any extent directly or indirectly. Wherefore, in obedience to that obvious purpose, the court does not feel at liberty to adopt any constrained or technical definitions of the words "bounty" or "grant" suggested, but to vouchsafe the paragraph a meaning, well within its language, that will best effectuate the unquestioned congressional purpose." (p. 106.)

In reply to the contention that the "compensation" was a reimbursement of extra costs imposed on the goods by British excise regulations, the Court of Customs Appeals said:

"The fact that the payment made by the foreign government was estimated or calculated upon a certain basis or in consideration of extra burdens imposed by domestic excise laws, or for any other reason of domestic government or policy commending itself to the wisdom of Parliament, is not controlling with our courts. The sole inquiry is, do the results of such acts stimulate exportation or give a special advantage by affording aid from the public treasury whereby

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such goods may when exported be sold in competition with ours for less."

With this construction of the Act in mind, it remains to determine whether the practices and operations of the German government with respect to exports to this country constitute bounties or grants requiring the imposition of countervailing duties. The proposed Decision of the Secretary of the Treasury after stating that "official reports and other data in the files of the Department establish to its satisfaction that bounties and/or grants are paid and/or bestowed, directly or indirectly," on exports from Germany to the United States of certain described dutiable articles, gives notice that "countervailing duties equal to any bounty and/or grant *found to have been paid and/or bestowed* will be collected" thirty days after publication of the notice, and that at that time the liquidation of all entries covering such articles shall be suspended pending the declaration of the "bounty and/or grant *determined or estimated to have been paid and/or bestowed*, and the net amount of countervailing duties to be collected," a deposit of estimated countervailing duties being required at the time of entry. It will be observed from the words indicated by italics that even if the proposed Treasury Decision is issued, a finding that a bounty or grant in fact has been paid or bestowed still remains to be made with respect to any particular importation before declaration of the amount of the bounty or grant determined or estimated to have been paid and of the amount of countervailing duty therefore to be collected.

The Treasury Department states that it has evidence that direct cash bounties are being paid by German industrial associations. Clearly if such a cash bounty is paid in connection with any exportation from Germany the law requires imposition of a countervailing duty and no further discussion on this point is necessary, only a question of fact being involved. The proposed Treasury Decision would be appropriate in its present form to meet any such cash bounties, since under it a determination that such a cash bounty in fact has been paid on any particular shipment is still necessary.

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The Treasury Department describes certain scrip and bond procedures, which may be summarized briefly as follows: German debtors are required to pay the interest and amortizations of the principal on certain foreign-owned German securities to a conversion bank (Konversionkasse) which then pays to the owner of the security in currency one half of the amount due thereon, and the remaining one half in so-called "scrip" which theoretically is redeemable at its face value at some time in the future, both the date and the probability of ultimate redemption being uncertain. The Gold Discount Bank, which is an agency of the German government, maintains a bid of fifty per cent of the face value of the "scrip". Because of the uncertainty of redemption, the foreign owners of the "scrip" usually prefer to sell it to the Gold Discount Bank for fifty per cent of its face value rather than risk a full loss by holding it for ultimate redemption.

German exporters who otherwise would be unable to sell goods in the United States except at a loss are allowed, under special permits issued by German exchange control authorities, to use part of the proceeds received from particular export transactions to purchase "scrip" from the Gold Discount Bank at a discount somewhat less than fifty per cent. Thereupon the particular exporter may present the "scrip" to the conversion bank and receive its full face value. The German authorities grant such special permits only if the current policy of the German government deems exportation of the goods desirable; and the amount of "scrip" so allowed to be purchased and redeemed in connection with a particular export transaction is measured by the loss in the export sale which is intended to be off-set by this procedure.

Similarly, the German exchange control authorities, when satisfied that an exporter will otherwise sustain a loss in a particular export sale, grant the exporter special permission to have part of the foreign exchange proceeds of the sale used for the purchase in the United States of German dollar bonds at the prevailing market price. Because of the disability of the foreign owners of such bonds respecting sale or redemption of them in Germany, such bonds sell at substantial discounts. However, when they are acquired as just

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indicated for the account of the German exporter, the bonds are redeemed at par by the conversion bank in Germany which handles the entire transaction of purchasing and redeeming the bonds. This procedure, likewise, is permitted only if the German exchange control authorities deem the particular exportation desirable and only such amount of bonds is permitted to be purchased as such authorities find to be necessary to off-set the loss on the export sale.

The Treasury Department's position is that such "scrip" and bond transactions constitute grants to the German exporter by the German government because of the exportation of the German goods to the United States, and that the concession has a value which can be ascertained exactly in terms of United States currency. It asserts that the value of such concession is not paid for by the American purchaser and that it enables the German exporter to sell his goods more cheaply in the United States in competition with our domestic goods. It, therefore, concludes that such procedures constitute the bestowal of an indirect bounty or grant which the statute requires to be countervailed.

The Treasury Department also describes certain currency manipulations which may be summarized briefly as follows: All German marks are of one class, having a nominal exchange value in American currency at the present time of approximately forty cents. However, large sums in marks are held in Germany in mark accounts which bear different names according to the origin of the funds. The characteristic of all such accounts for present purposes is the same,—they are "controlled", "frozen" or "blocked" accounts. It will be sufficient to mention here two of such accounts, known respectively as "Aski mark accounts" and "Barter mark accounts" and comprised of funds paid by German importers into blocked or frozen accounts. Regulations were put into effect in Germany by virtue of which all imports into that country are controlled under a licensing system. The funds in Aski mark accounts consist of payments for essential raw materials imported into Germany under general or special permits—in trade with the United States they arise chiefly from sales of cotton by shippers from this country. Barter mark accounts arise from sales to Germany of non-essential goods. The funds

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in such accounts cannot be used for any purpose whatsoever without special permission of the German exchange control authorities. Hereafter for convenience the marks in all such accounts will be referred to as "controlled marks" to distinguish them from uncontrolled marks in free circulation in Germany. The principal use of controlled marks is for payment for goods exported from Germany, the controlled funds being held in Germany for foreign account and the disposition and use of them by their foreign owners being restricted. However, it must continually be borne in mind that there is only one type of mark in Germany, whether it be in a controlled account or in free circulation.

By reason of the control exercised by the German government over such controlled mark accounts and its restriction over the disposition and use of them by their foreign owners, the market value of such marks has greatly depreciated. When a German exporter finds that he cannot meet competition in our markets under existing currency exchange conditions, he may apply to the exchange control authorities of Germany for permission to accept payment for particular exportations in whole or in part in controlled marks. If the authorities consider the particular exportation to be in accord with the current policy of the German government, the requested permission is granted. The American importer of German goods purchases controlled marks at their reduced values. The German exporter then receives either in full or part payment (as the German exchange control authorities determine) controlled marks—whereupon such marks immediately become released from the control and are of the value of marks in free circulation in Germany.

The Treasury Deparment gives the following example to illustrate the device and effect of German export transactions involving use of the controlled mark: If the price to be received by the German exporter is one hundred marks and he has no permission from the German exchange control authorities to receive controlled marks in payment, the cost to the American importer will be approximately forty dollars, the value of the free mark being forty cents. If, however, the German exporter can compete advantageously in our market only if he is in a position to sell the goods for twenty eight dollars and the German authorities determine

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that a sale at that price should be facilitated, the German exporter may be permitted to receive full payment for the goods in controlled marks obtainable by the American importer for twenty eight cents per mark; or in the more usual case, permission may be granted to the exporter for the acceptance by him, say, of seventy five controlled marks obtainable by the American importer at twenty four cents per mark, and the balance of twenty five marks will be received by the German exporter in free marks costing the American importer forty cents each. Since the controlled marks immediately become free marks in the hands of the German exporter, it is obvious that on final settlement the German exporter receives one hundred marks of the uniform value of forty cents each. In either case the American importer has paid twenty eight dollars for the goods and the German exporter has received one hundred marks worth forty dollars in our currency.

The Treasury Dopartment asserts in respect of the above example that the only factors intervening between the American importer and the German exporter to effect this addition of value to the purchase between the payment and the receipt thereof are the acts of the German government; that by these acts there is granted to a favored exporter of privileged German goods, because of their exportation to the United States, a concession valued in our money at twelve dollars, which enables the German exporter to sell his goods more cheaply in the United States in competition with our domestic products; and that the case is squarely within the purview of the law requiring the application of additional duties to countervail the grant bestowed upon the German exporter by the German government on exportation of the German goods. It is pointed out that generally speaking, these various devices appear to be operated in such a way as to enable the German exporter to sell his goods abroad at prices prevailing in the foreign markets in terms of the national currencies of these markets, which he is not able to do except on the basis of depreciated marks.

It seems obvious that the scrip, bond and currency manipulation procedures or devices are all for the benefit of German exporters and enable them to export their goods

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so as to be in a position to compete with our domestic products, instead of exporting their goods to this country at a loss. Export transactions are completely controlled by the German government which permits only such exports as it deems to be in the German interest, and the devices described are means by which the German government enables the German exporters to export without incurring loss. In reality the assistance which the German exporter receives seems to be financed by levies upon capital and income collected from foreign creditors of German debtors by the German government and paid over by it to the favored German exporters. It is true that the funds so used to aid the German exporters may not be transmitted through the German treasury, but I do not deem that material. I may add that it appears that the German authorities also completely control imports into Germany, permitting only those which are deemed for the benefit of that country. The Treasury Department states that to some extent the aid to German exporters is financed by levies collected from German importers. The whole policy indicates a desire to encourage exports from and discourage imports into Germany.

I have heretofore observed how broad is the language of the statute requiring imposition of countervailing duties. While it may be that when that Act was passed the Congress did not have in mind the particular procedures or devices under consideration, as I have observed the statute was plainly intended to anticipate as inclusively as possible all practices and devices which might be resorted to or invented to circumvent it by obscuring or concealing their purposes as bounties or grants. It has also been pointed out that the Supreme Court has noted the extent of its scope—"A word of broader significance than 'grant' could not have been used." Not only a direct bounty or grant, but one which is indirect is expressly comprehended by the statute, which in addition to referring to a bounty or grant directly or indirectly paid or bestowed, takes the precaution of adding "however the same be paid or bestowed."

I have no doubt that the scrip and bond practices and also the currency manipulations constitute the payment or bestowal, directly or indirectly, of bounties and grants upon

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German exports calling for the imposition by the Treasury Department of countervailing duties. It has been suggested that such practices are not within the Act because they are merely special forms of currency depreciation, and that currency depreciation whether complete or partial is not a bounty or grant. The difficulty with the latter position is that the practices are selective and discriminatory for the express purpose of enabling German exporters to sell their goods here at prices prevailing in our markets, which they are not able to do except on the basis of such procedures. The argument seems to be that since uniform depreciation or devaluation of German currency would not be within the Act, notwithstanding that it would stimulate exports from Germany to the United States to even a greater extent than the practices under consideration, therefore partial, special or selective depreciation or devaluation, such as accomplished by the practices discussed, would not be within it. I do not believe that such conclusion follows from the premise upon which it is based. In the event of a complete or general depreciation or devaluation, there would be no discrimination between one exporter and another, or exporters as distinguished from importers, or other third parties.

Under the scrip and bond practices and the partial, special or selective devaluation or depreciation practices (if the question is to be discussed in terms of currency devaluation or depreciation), the whole aim seems to be to vest in the German government absolute control over exports; the determination of whether the particular export is to the best interests of Germany, the determination of how much depreciated currency is required by the exporter in order to enable him to place his goods in this country in competition with similar goods here, and the necessary manipulation to accomplish the end desired. The procedures or devices under discussion seem to fall very precisely within the language quoted, *supra*, from the cases of *Nicholas & Co.* v. *United States*. The intent of the practices is to assist German exporters and the results carry out that intent. "However the same be paid or bestowed" it is plain that there is a bounty or grant paid or bestowed "directly or indirectly"

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by the German government which has established the machinery for the benefit of the German exporter and which assists him in the operation of it.

For the foregoing reasons it is my opinion that the Treasury Decision proposed to be issued by the Secretary of the Treasury is within the requirements of Section 303 of the Tariff Act of 1930, and its form is appropriate to carry out the mandate of that statute.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

VALIDITY OF A PROPOSED BOND ISSUE OF PUERTO RICO

The proposed bond issue of Puerto Rico in the amount of $1,000,000 for the construction of insular and municipal roads is authorized under the acts cited herein; and the form of bond submitted complies with the law and the determinations of the Treasurer of Puerto Rico approved by the Governor.

DEPARTMENT OF JUSTICE,
June 24, 1936.

SIR: I have your letter of June 23, stating that your Department has been authorized to sell for the account of the Government of Puerto Rico bonds of the face value of $1,000,000, the proceeds to be used for the construction of insular and municipal roads, and requesting my opinion concerning their legality.

It is proposed to issue the bonds under authority contained in Section 3 of the Act of Congress approved March 2, 1917, entitled "An Act to provide a civil government for Puerto Rico, and for other purposes," as amended by the Act of March 4, 1927 (c. 145, 39 Stat. 951, 953; c. 503, 44 Stat. 1418, U. S. C., Title 48, Secs. 741, 745), and Act No. 123 of the Legislature of Puerto Rico, approved May 15, 1936.

You state that they are to be issued in coupon form, in the denomination of $1,000 each, to be dated July 1, 1936, and to bear interest as indicated below, payable at the Treasury of the United States semi-annually on January 1 and July 1 of each year, the bonds to mature and the principal thereof to be payable in series as follows:

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$500,000, Series "A" on July 1, 1937.
$500,000, Series "B" on July 1, 1938.

The rate of interest has not been definitely fixed and the advertisement for sealed proposals will invite each bidder "to name the lowest coupon rate which will permit him to submit a bid of at least par for the bonds, said rates, however, to be stated as a multiple of ¼ of 1% or $\frac{1}{10}$ of 1%, as the bidder may prefer," one rate to apply to the entire issue. A copy of the form of the proposed bond was submitted with your letter.

Section 3 of the Act of March 2, 1917, as amended, provides:

"* * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Puerto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however*, That no public indebtedness of Puerto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Puerto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Puerto Rico has heretofore been pledged and bonds issued by the people of Puerto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Puerto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Puerto Rico is pledged shall be counted."

Your letter and the documents submitted by you show that the aggregate assessed valuation of real and personal property in Puerto Rico on May 15, 1936, amounted to $294,069,663, that on the said date there were outstanding bonds of the Government of Puerto Rico of the face value of $27,580,000 and notes evidencing temporary loans of the face value of $557,494.54, that since the amendatory Act of March 4, 1927, the good faith of the people of Puerto Rico has been pledged to the payment of principal and interest on outstanding municipal bonds aggregating $1,198,500 which, under the statute, must be added to the foregoing,

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making a total of $29,335,994.54. From this amount, however, there is to be deducted $875,502.39, representing the amount accumulated in the various sinking funds, pledged by statute and applicable only to the payment of unmatured obligations included in the foregoing total figures (35 Op. 9, 14; 37 id., 30, 32), and a further sum of $250,000, representing 1914 refunding bonds (also included in the foregoing total figures), secured by municipal bonds held by the insular government and therefore to be deducted when ascertaining the amount of the permitted indebtedness of that government, as provided in the Act of Congress, making a net total of $28,210,492.15.

Considering the foregoing figures, it is apparent that the indebtedness of the Government of Puerto Rico when increased by the amount of the contemplated issue will be within the maximum permitted by law (10% of the aggregate tax valuation).

The pertinent provisions of Act No. 123 of the Legislature of Puerto Rico are as indicated below.

Section 2 authorizes and directs the Treasurer of Puerto Rico, with the approval of the Governor, to issue bonds in an amount not greater than $6,000,000, the proceeds from the sale of the bonds to be applied to the completion and construction of roads and bridges, in furtherance of a general plan previously adopted and in accordance with the directions and tables set forth in the statute.

Sections 5, 6, 9, 10 and 13 read, in part, as follows:

"SECTION 5. The bonds the issuance of which is hereby authorized may be in the form of coupon or registered bonds, or in both forms. Registered bonds shall be recorded and transferred in the office of the registrar of the Treasury Department of the United States, Washington, District of Columbia. The bonds shall be dated as of July 1 of the year when issued, and shall bear interest at a rate of not to exceed four and one-half (4½) percent per annum, payable every six months on the first of January and the first of July of each year. The bonds issued in coupon form shall be of the value of one thousand (1,000) dollars each, and those issued in the form of registered bonds shall have a value of five thousand (5,000) dollars each."

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"SECTION 6. Said bonds shall be paid in twelve annual installments, as follows:

"Five hundred thousand (500,000) dollars on July first of each of the years from 1937 to 1948, both inclusive; * * *." [with reservation of a right of redemption after six years—which does not affect series "A" and "B" presently under consideration].

"SECTION 9. * * * *Provided*, That for the payment of the principal of, and the interest on, said bonds, as they become due, the good faith of The People of Puerto Rico is hereby irrevocably pledged."

"SECTION 10. The bonds the issuance of which is authorized by this Act, may be sold by the Treasurer of Puerto Rico, or by the Secretary of the Interior of the United States, or by any fiscal agent appointed for that purpose by the Treasurer of Puerto Rico, with the approval of the Governor, under conditions most advantageous for The People of Puerto Rico and as near as possible to their dates of issuance. * * *

"With the approval of the Governor, the Treasurer of Puerto Rico shall have absolute authority, within the limitations prescribed in this Act, in connection with all matters related to said bonds, including the conditions and denominations thereof and the manner, time, and method of their issuance and sale; he shall adopt such measures as may be necessary to carry out the provisions of this Act and shall provide whatever may be necessary for the issuance of interim bonds or certificates pending the preparation of the definitive bonds."

"SECTION 13. The bonds authorized by this Act shall be issued by the Treasurer of Puerto Rico in series of five hundred thousand (500,000) dollars each, but during no fiscal year can bonds be issued for a sum greater than the amount of such margin for incurring indebtedness as may be at the disposition of The People of Puerto Rico; * * *."

Other sections create an amortization fund, direct the depositing therein of the proceeds of an internal revenue tax on gasoline, levied by virtue of provisions in earlier Acts, and provide that all laws or parts of laws in conflict are repealed, mentioning specifically the conflicting provisions of earlier statutes directing other dispositions of the pro-

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ceeds of the gasoline tax. The Act further recites the existence of an emergency and declares that it shall become effective immediately after approval—in accordance with Section 34 of the Organic Act (U. S. C., Title 48, Sec. 827).

There was transmitted with your letter a statement signed by the Treasurer of Puerto Rico, setting forth his determinations in those matters left to his discretion, and this has been approved by the Governor, as provided in the Act of the Legislature.

I find that all the statutory requirements regarding the issue and sale of the said bonds have been complied with and that the form of bond submitted is in compliance with the law and the determinations of the Treasurer, approved by the Governor. The form of bond properly recites that "under the provisions of Section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Puerto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal sub-division of any State, Territory, or possession of the United States, or by the District of Columbia."

It is therefore my opinion that the bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Puerto Rico.

Respectfully,

HARRY W. BLAIR,
Acting Attorney General.

To the SECRETARY OF THE INTERIOR.

JURISDICTION OF SECRET SERVICE DIVISION, TREASURY DEPARTMENT, UNDER SECTION 12B OF FEDERAL RESERVE ACT

Under Section 12B of the Federal Reserve Act, as amended, the Secret Service Division of the Treasury Department is given jurisdiction with respect to all acts and omissions made offenses against the Federal Deposit Insurance Corporation and punishable by fine, imprisonment, or other penalty as prescribed in that section, including offenses of the character covered by

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Sections 112–117 of the Criminal Code, relating to bribery, forbidden contractual relationships with members of Congress, etc., in so far as the offenses thereunder are connected with "contracts or agreements" of the said Corporation.

A violation of Section 5209 of the Revised Statutes, as amended, which makes it an offense for any officer or employee of a Federal Reserve, Member, or insured bank to embezzle funds of such bank, etc., is punishable under that section and is subject to investigation by the Federal Bureau of Investigation of the Department of Justice; it is not an offense "punishable under" Section 12B of the Federal Reserve Act and for that reason subject to investigation by the Secret Service Division of the Treasury Department.

The question whether the bank should lose its insured status for having knowingly or negligently permitted the offense of the officer or employee is for determination of the Federal Deposit Insurance Corporation under Subsection (1) of Section 12B; but any investigation by the Secret Service Division in this connection should be confined to the question of knowledge or negligence on the part of the bank or its officers, and unnecessary duplication of investigations should be avoided.

DEPARTMENT OF JUSTICE,
June 30, 1936.

SIR: I have your letter of June 5 in which you state that "some difficulty and misunderstanding have arisen concerning the respective jurisdictions of the Bureau of Investigation of your Department and the Secret Service Division of this Department with respect to the detection, arrest, and delivery to the Federal marshal of persons who do or omit to do certain things prohibited or required as a result of section 12B of the Federal Reserve Act, as amended by section 101 of the Banking Act of 1935."

Section 12B was added to the Federal Reserve Act by the Banking Act of 1933 and was amended and reenacted by the Banking Act of 1935. It created the Federal Deposit Insurance Corporation and provided for the functioning and protection of the Corporation and the deposit insurance system also therein established. (Banking Act of 1933, 48 Stat. 162, 168, 178; Banking Act of 1935, Title I, 49 Stat. 684, 703.) Subsection (x) of Section 12B reads as follows:

"The Secret Service Division of the Treasury Department is authorized to detect, arrest, and deliver into the custody of the United States marshal having jurisdiction any person

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committing any of the offenses punishable under this section."

Your General Counsel, in the opinion which accompanied your letter, has concluded that the Secret Service Division of the Treasury Department is given jurisdiction with respect to all acts and omissions which are made offenses against the Federal Deposit Insurance Corporation by Section 12B and are punishable by fine, imprisonment or other penalty as prescribed in that section; and that this extends to offenses of the character covered by Sections 112–117 of the Criminal Code (U. S. C., Title 18, Secs. 202–207), relating to bribery, forbidden contractual relations with members of Congress, etc., in so far as the offenses thereunder are connected with "contracts or agreements" of the Federal Deposit Insurance Corporation, by reason of the following provision contained in Subsection (w) of Section 12B:

"The provisions of sections 112, 113, 114, 115, 116, and 117 of the Criminal Code of the United States (U. S. C., title 18, ch. 5, secs. 202 to 207, inclusive), insofar as applicable, are extended to apply to contracts or agreements with the Corporation under this section, which for the purposes hereof shall be held to include loans, advances, extensions, and renewals thereof, and acceptances, releases, and substitutions of security therefor, purchases or sales of assets, and all contracts and agreements pertaining to the same" [48 Stat. 178].

I am in accord with these conclusions of your General Counsel, and it is my understanding that the Federal Bureau of Investigation of the Department of Justice does not assume jurisdiction in connection with such offenses.

It therefore appears probable that the misunderstanding which you mention may have concerned investigations in matters other than offenses under Section 12B of the Federal Reserve Act, or possibly arose from some misapprehension as to what are offenses under that section in particular cases. For example, Section 5209 R. S., as amended (U. S. C., Title 12, Sec. 592), made it an offense for any officer, director, agent, or employee of a Federal Reserve Bank or Member Bank to embezzle the funds of such bank, to issue notes without authority, to make certain false entries, etc.; and Section 316 of the Banking Act of 1935

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(Title III, relating to "Technical Amendments to the Banking Laws") provides that Section 5209 R. S. "is hereby amended" by inserting words so as to make the section applicable to "any insured bank as defined in subsection (c) of Section 12B of the Federal Reserve Act." A violation of Section 5209 R. S., as thus amended, is punishable under that section (5209) by fine or imprisonment, or both, and is subject to investigation by the Federal Bureau of Investigation of this Department; it is clearly not an offense "punishable under" Section 12B of the Federal Reserve Act and for that reason subject to investigation by the Secret Service Division of the Treasury Department.

Section 12B of the Federal Reserve Act provides in subsection (i) thereof for an additional penalty *against the bank* (the revocation of its insured status) if it appears that the bank or its directors or trustees *knowingly or negligently permitted* the forbidden act—but any such offense by the bank is separate and distinct from the offense of the officer or employee. The crime of the defaulting officer or employee is punishable under Section 5209 R. S., as amended; the bank may lose its status under Section 12B of the Federal Reserve Act.

The crime under Section 5209 R. S. is subject to investigation by the Federal Bureau of Investigation of this Department. The question of revocation of the bank's status is for handling by the Federal Deposit Insurance Corporation, as provided in Subsection (i) of Section 12B. If the services of the Secret Service Division of the Treasury Department are to be availed of, its investigation should properly be confined to the question of knowledge or negligence on the part of the bank or its directors or trustees, and care should be exercised to avoid unnecessary duplication of investigations. This Department must investigate, and must establish an offense punishable under Section 5209 R. S. as a basis for any successful charge against the bank of negligence or knowledge in connection with its commission.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

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REFINANCING BY COMMODITY CREDIT CORPORATION OF CERTAIN INDEBTEDNESS TO RECONSTRUCTION FINANCE CORPORATION

The Commodity Credit Corporation is authorized as an agency of the United States to issue its notes or debentures for refinancing its indebtedness to the Reconstruction Finance Corporation in accordance with the plan outlined.

The Reconstruction Finance Corporation is authorized to make available to the Commodity Credit Corporation, if necessary, sufficient funds to enable the latter to pay at maturity the notes or debentures which it proposes to issue for the purpose above stated.

DEPARTMENT OF JUSTICE,
July 8, 1936.

SIR: I have the honor to acknowledge your letter of July 1, 1936, requesting my opinion on certain legal questions respecting the Commodity Credit Corporation and the Reconstruction Finance Corporation, submitted by the Chairman of the latter.

The Chairman of the Reconstruction Finance Corporation states that Commodity Credit Corporation owes Reconstruction Finance Corporation approximately $163,000,000, secured by notes of cooperative marketing associations and producers of agricultural commodities, which, in turn, are secured by negotiable warehouse receipts or certificates representing agricultural commodities having a present aggregate market value of approximately $217,000,000.

He further states that Commodity Credit Corporation proposes to refinance this indebtedness in part by the issuance and sale of collateral trust debentures not to exceed the aggregate principal amount of $160,000,000, said debentures to be secured by the collateral now securing its obligation to Reconstruction Finance Corporation. The proceeds of the notes are to be paid to Reconstruction Finance Corporation to be applied on account of the aforesaid indebtedness of Commodity Credit Corporation. In connection with such issuance and sale, this Corporation is to agree that it will make funds available to Commodity Credit Corporation sufficient (a) to assure proper care and preservation of the collateral commodities securing said debenture, and (b) to enable Commodity Credit Corporation to pay such debentures at their maturity in the event that repayments,

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collections and recoveries from the pledged collateral are insufficient to liquidate the debentures in full at that time. It is understood that the funds which Reconstruction Finance Corporation thus agrees to make available will be covered by a note payable on or before March 1, 1937, with interest at the rate of 3% per annum, payable at maturity, the said note to be secured by the negotiable warehouse receipts or certificates hereinbefore mentioned, or such part thereof as has not been liquidated and applied to the payment of the debentures which the Commodity Credit Corporation proposes to issue for the refinancing purposes mentioned.

The two questions submitted are as follows:

(1) Is Commodity Credit Corporation now authorized, as an agency of the United States, to issue notes, as outlined in the two immediately preceding paragraphs?

(2) Is the Reconstruction Finance Corporation authorized to agree, as outlined in said two paragraphs, to make sufficient funds available to Commodity Credit Corporation to enable it to pay at maturity the notes it proposes to issue?

The Commodity Credit Corporation was organized under the laws of Delaware pursuant to Executive Order No. 6340 of October 16, 1933. The order recited that "in order, effectively and efficiently, to carry out the provisions of" (1) The Agricultural Adjustment Act, approved May 12, 1933; (2) The National Industrial Recovery Act, approved June 16, 1933; (3) The Federal Emergency Relief Act of 1933, approved May 12, 1933; (4) Reconstruction Finance Corporation Act, approved January 22, 1932; (5) The Federal Farm Loan Act, approved July 17, 1916; (6) The Farm Credit Act of 1933, approved June 16, 1933; and (7) The Emergency Relief and Construction Act of 1932, approved July 21, 1932, "it is expedient and necessary that a corporation be organized with such powers and functions as may be necessary to accomplish the purposes of said acts"; and it directed the Secretary of Agriculture and the Governor of the Farm Credit Administration to cause the Commodity Credit Corporation to be formed under the laws of the State of Delaware.

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The charter of the corporation provides, among other things, that the corporation may "borrow money and * * * draw, make, accept, * * * execute, and issue bonds, debentures, mortgages, promissory notes, * * * and all kinds of obligations and non-negotiable, negotiable or transferable instruments * * * and for the security of any of its obligations * * * convey, transfer, assign, deliver, mortgage, and/or pledge all or any part of its property or assets upon such terms and conditions as the Board of Directors shall authorize." I am informed that after its organization the corporation, acting as an agency of the Government, engaged in the functions authorized by its charter, including the borrowing of money and the issuing of its obligations therefor.

It is well established that the United States may act through corporate agencies. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Clallam County* v. *United States*, 263 U. S. 341. Certain provisions contained in the two statutes first mentioned in the Executive order (the Agricultural Adjustment Act and the National Industrial Recovery Act) have been held unconstitutional by the Supreme Court. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter Corp.* v. *United States*, 295 U. S. 495; *United States* v. *Butler*, 297 U. S. 1. It is to be noted, however, that the corporation was not organized solely for the carrying out of the purposes of the Agricultural Adjustment Act and the National Industrial Recovery Act, and independently of those Acts specific legislative authority for the existence of the corporation is found in the following provision contained in Section 7 of the Act of January 31, 1935, 49 Stat. 1, 4:

"Notwithstanding any other provision of law, *Commodity Credit Corporation, a corporation organized under the laws of the State of Delaware as an agency of the United States pursuant to the Executive order of the President of October 16, 1933, shall continue, until April 1, 1937*, or such earlier date as may be fixed by the President by Executive Order, to be an agency of the United States. During the continuance of such agency, the Secretary of Agriculture and the Governor of the Farm Credit Administration are authorized

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and directed to continue, for the use and benefit of the United States, the present investment in the capital stock of Commodity Credit Corporation, *and the corporation is hereby authorized to use all its assets*, including capital and net earnings therefrom, *and all moneys which have been or may hereafter be allocated to or borrowed by it*, in the exercise of its functions as such agency, including the making of loans on agricultural commodities." [Italics supplied.]

The power of the Congress to ratify administrative action in order to supply statutory authority therefor was expressly upheld in *United States* v. *Heinszen & Co.*, 206 U. S. 370, 384.

The Commodity Credit Corporation, having thus been organized for the carrying out of statutes enacted by the Congress, with the power to borrow money and issue its obligations and pledge its assets as security therefor, and the Congress by the Act of January 31, 1935, having specifically recognized the corporation as so organized to be an agency of the United States and having authorized its continuance as such agency, with full authority to continue to exercise its powers and functions, including the power to borrow money, until April 1, 1937, it follows that the corporation is now authorized as an agency of the United States to issue its notes or debentures for the purposes referred to in your first question.

As related to your second question, the proposed transaction in its essence amounts to a provision by the Reconstruction Finance Corporation for the liquidation and administration of the collateral which it now holds as security for its loan to Commodity Credit Corporation. Reconstruction Finance Corporation through this means will receive immediately the proceeds of the debentures or notes to be issued and sold by Commodity Credit Corporation in accordance with the proposed arrangement, and will retain its right against the latter for any deficiency remaining unpaid after the application of such proceeds to the obligation of Commodity Credit Corporation to Reconstruction Finance Corporation. For its own protection Reconstruction Finance Corporation agrees to make available

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such funds as may be necessary properly to care for and preserve the collateral commodities securing the debentures or notes—which in reality does not increase the now existing obligation of Reconstruction Finance Corporation, since for its own protection it must expend such funds as may be necessary to properly care for and preserve the commodities now constituting the security for the aforesaid loan to Commodity Credit Corporation. Also, in order that it may receive immediately the proceeds from the sale of the debentures or notes, Reconstruction Finance Corporation, to assure the sale of them, agrees to make available such funds as may be necessary to liquidate any balance remaining unpaid on such debentures or notes at their maturity after the application thereto of repayments, collections, and recoveries from pledged collateral—which in reality does not alter the now existing status of Reconstruction Finance Corporation, since it now would bear, except so far as collectible from Commodity Credit Corporation, the loss resulting from any deficiency in the collateral securing the loan to the latter. It appears from documents submitted that the Directors of Reconstruction Finance Corporation have given this matter careful consideration and have determined that the proposed plan will result in material financial advantage to that Corporation.

In view of the foregoing, it is my opinion that the proposed agreement by Reconstruction Finance Corporation to make available to Commodity Credit Corporation, if it should become necessary, sufficient funds to enable it to pay at maturity the debentures or notes which it proposes to issue is authorized by section 201 (f) of the Emergency Relief and Construction Act of 1932 (47 Stat. 709, 713; U. S. C., Title 15, sec. 605b(f)), which expressly provides, among other things, as follows:

"The corporation (Reconstruction Finance Corporation), *under such conditions as it shall prescribe*, may take over or *provide for the administration and liquidation of any collateral* accepted by it as security for such loans." [Italics supplied.]

This conclusion is supported by the provisions of the Act of January 31, 1935, c. 2, 49 Stat. 1, 5, extending the func-

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tions of the Reconstruction Finance Corporation for two years and for other purposes, section 13 of which provides as follows:

"Notwithstanding any other provisions of law, the Reconstruction Finance Corporation is authorized and empowered to use as general funds all receipts arising from the sale or retirement of any of the stock, notes, bonds, or other securities acquired by it pursuant to any provision of law."

Under the circumstances presented, it is my opinion that the following statutory provisions also corroborate the authority of the Reconstruction Finance Corporation to make the proposed agreement to make available to Commodity Credit Corporation, if it should become necessary, sufficient funds to enable it to pay at maturity the debentures or notes which the latter proposes to issue.

The Act of January 22, 1932, creating the Reconstruction Finance Corporation, expressly provides, among other things, that the corporation shall have power "to make contracts". (47 Stat. 5, 6, Sec. 4; U. S. C., Title 15, Sec. 604.) Section 2 (a) of the Act of January 31, 1935, c. 2, 49 Stat. 1, 2 (U. S. C., Title 15, sec. 604 (b)), by virtue of the following language, plainly contemplates that the Reconstruction Finance Corporation may make commitments or agreements to make loans or advances:

"* * * no funds shall be disbursed *on any commitment or agreement* hereafter made by the Reconstruction Finance Corporation *to make a loan or advance*, subscribe for stock, or purchase capital notes or debentures, after the expiration of one year from the date of *such commitment or agreement;* but within the period of such one year limitation no provision of law terminating any of the functions of the Reconstruction Finance Corporation shall be construed to prohibit *disbursement of funds on commitments or agreements to make loans or advances*, subscribe for preferred stock, or purchase capital notes or debentures." [Italics supplied.]

By virtue of section 201 (d) of the Emergency Relief and Construction Act of 1932 (47 Stat. 709, 712; U. S. C., Title 15, sec. 605b (d):

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"The Reconstruction Finance Corporation is authorized and empowered to make loans to bona fide institutions, organized under the laws of any state or of the United States and having resources adequate for their undertakings, for the purpose of enabling them to finance the carrying and orderly marketing of agricultural commodities and livestock produced in the United States."

Section 201 (f) of the same Act provides, among other things, that:

"Such loans shall be made on such terms and conditions, not inconsistent with this Act, as the corporation may prescribe, and may be made directly upon promissory notes or by way of discount or rediscount of obligations tendered for the purpose, or otherwise in such form and in such amount and at such interest or discount rates as the corporation may approve * * *."

And when the powers of the Reconstruction Finance Corporation under section 201 (a) of the Emergency Relief and Construction Act of 1932 were terminated, section 301 of Title III of the National Industrial Recovery Act (48 Stat. 210) expressly provided:

"that the Reconstruction Finance Corporation may issue funds to a borrower under such subsection (a) prior to January 23, 1939, under the terms of any agreement or any commitment to bid upon or purchase bonds entered into with such borrower pursuant to an application approved prior to the date of termination, under this section, of the power of the Reconstruction Finance Corporation to approve applications."

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

CONSIDERATION OF CLAIM OF CITY OF CLEVELAND UNDER ACT OF DECEMBER 28, 1922, C. 17, 42 STAT. 1066

The Secretary of the Interior is authorized to consider under the Act of December 28, 1922, c. 16, 42 Stat. 1066, a claim of the City of Cleveland, Ohio, in the amount of $69.41, for damage to a fire hydrant resulting from its being struck by a truck operated by an enrollee of the Civilian Conservation Corps.

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DEPARTMENT OF JUSTICE,
August 12, 1936.

SIR: From your letter of June 2, 1936, it appears that the city of Cleveland, Ohio, has submitted to you a claim in the amount of $69.41 for damage to a fire hydrant of the city in December 1935 by a National Park Service truck operated by an enrollee in the Civilian Conservation Corps. You request my opinion as to whether you are authorized to consider this claim, and other similar claims, under the Act of December 28, 1922, c. 17, 42 Stat. 1066 (U S. C., Title 31, Sec. 215).

Section 2 of that Act, as incorporated into Section 215, Title 31 of the United States Code, reads as follows:

"The head of each department and establishment acting on behalf of the Government of the United States may consider, ascertain, adjust, and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor, together with a brief statement of the character of each claim, the amount claimed, and the amount allowed: *Provided*, That no claim shall be considered by a department or other independent establishment unless presented to it within one year from the date of the accrual of said claim."

As you indicate in your letter, whether or not you are authorized to consider the claim of the city of Cleveland depends upon whether the damaged fire hydrant is "privately-owned" property within the purview of the statute.

Ordinarily privately-owned property, or private property, is understood to embrace property owned by individuals or private corporations as distinguished from property owned by governmental bodies or agencies; but this conception of private property is subject to qualification. It has been held, for instance, that property owned by a state may be private property in relation to the Federal

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Government with respect to the clause of the Fifth Amendment prohibiting the taking of private property without just compensation. In *Wayne County, Kentucky*, v. *United States*, 53 Ct. Cls. 417 (affirmed *per curiam*, 252 U. S. 574), the Court of Claims awarded judgment to the county for the taking of a public highway, saying (p. 424):

"While such property is within most of the definitions of public and not private property, we are of the opinion that for purposes of compensation as for a taking under the Constitution it is properly to be regarded as private property and upon that theory we have awarded judgment." See also *Stockton* v. *Baltimore & N. Y. Railroad Co.*, 32 F. 9.

In *Coyle* v. *Gray*, 30 Atl. 728, 12 Del. (7 Houst.) 44, the court indicated that property owned by a municipality may be designated as public property in relation to its inhabitants but as private property in relation to a state or to the United States, saying (p. 733):

"The municipality may hold property in which all the inhabitants of a state or of a county may be said to have an interest in some respect, but not as owners or proprietors. And it may also hold property in which the inhabitants of the municipality alone may properly be said to have an interest. Both classes of property are public,—the one, as to the people of the whole state or county; the other, more particularly, as to the inhabitants of the municipality. It is only in this sense that the words 'public' and 'private' can with propriety be applied to such property, when held by a municipality. Although the property held for the municipality is in fact public, as common to all the inhabitants of a city, it nevertheless may justly be said to be private property, as being such property as is exempt from being taken or applied to any other public use by the state, or by authority of the state, without compensation being made."

See also *State of Kansas* v. *Shawnee County*, 83 Kans. 199, 110 P. 92; *Hart* v. *City of New Orleans*, 12 F. 292; *Shamrock Towing Co.* v. *City of New York*, 20 F. (2d) 444.

While the legislative history of the Act of December 28, 1922, contains no discussion of the meaning of the words

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"privately-owned property", the broad purpose of the Act—to relieve the Congress of the burden of passing upon numerous small meritorious claims against the Government not within the jurisdiction of the courts—as indicated by such history (H. Rept. No. 342, 67th Cong., 1st Sess.), is consonant with the view that claims of municipalities may properly be considered under its provisions.

The view that claims of municipalities may properly be considered under the statute is fortified by the prevailing administrative practice. Inquiry of the several departments has developed that it has been the uniform practice since passage of the Act to consider and determine claims submitted by municipalities and other state agencies on the same basis as claims submitted by individuals or private corporations. I am informed that in the Post Office Department, the Department of Agriculture, and the War Department claims of municipalities considered and allowed under this statute have been quite numerous, and that such claims have also been allowed by the Navy and the Treasury Departments. In some of the departments no such claim seems to have been passed upon; but apparently no department has declined to consider such a claim by reason of the fact that the property involved was owned by a municipality or other state agency. I am also advised that the Congress has invariably appropriated funds for the payment of such claims certified to it under the statute. It thus would seem that the Congress has adopted the uniform administrative construction of the statute. No reason appears why this construction and the prevailing practice thereunder since the enactment of the statute should now be disturbed.

For the reasons stated, it is my opinion that you are authorized to consider the claim of the city of Cleveland, and other similar claims, under the Act of December 28, 1922.

The file pertaining to the claim of the city of Cleveland is herewith returned.

Respectfully,

HOMER CUMMINGS.

To the Secretary of the Interior.

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ISSUANCE OF DUPLICATES OF LOST OR DESTROYED DEBENTURES OF THE FEDERAL HOUSING ADMINISTRATION

The issuance of duplicates of lost or destroyed debentures of the Federal Housing Administrator which are guaranteed by the United States is governed by the principles set forth in the opinion of October 14, 1935, to the Secretary of the Treasury respecting the issuance of duplicate bonds by the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation.

DEPARTMENT OF JUSTICE,
August 13, 1936.

SIR: I have your letter of August 5, 1936, in which you request my opinion "as to whether the Federal Housing Administrator, with the approval of the Secretary of the Treasury, has authority * * * to adopt and promulgate regulations providing for the issuance of duplicates in case of lost or destroyed debentures of the Federal Housing Administrator which are fully guaranteed by the United States."

The debentures are issued by the Federal Housing Administrator in settlement of claims for losses sustained by persons insured under Title II of the National Housing Act (June 27, 1934, c. 847, 48 Stat. 1246; U. S. C., Title 12, Sec. 1710). They are payable out of the Mutual Mortgage Insurance Fund, set up as provided in the statute, but are "fully guaranteed as to principal and interest by the United States."

Both the General Counsel of the Federal Housing Administration and General Counsel of the Treasury Department have reached the conclusion that the issuance of duplicate debentures is governed by the principles set forth in my opinion to you of October 14, 1935, respecting the issuance of duplicate bonds by the Home Owners' Loan Corporation and Federal Farm Mortgage Corporation. As indicated in their opinions (copies of which accompanied your letter), the question which you now submit differs in no material particular from that considered in my opinion of October 14, 1935 (38 Op. 332). The Federal Housing Administration, the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation are comparable instrumentalities of the Federal Government and each administers a fund and issues obligations chargeable against it.

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The Federal Housing Administration is not a corporation, but the principles which govern the issuance of duplicates of its obligations do not depend upon the character of the instrumentality in this respect. It is perhaps pertinent in this connection to mention my opinion to you of October 9, 1935, which points out the similarity, in effect, of the guarantees by the United States of the obligations of the Home Owners' Loan Corporation, the Federal Farm Mortgage Corporation, and the Federal Housing Administrator, notwithstanding some differences, not of substance, in the several statutes involved.

I therefore conclude that the issuance of duplicates of lost or destroyed debentures of the Federal Housing Administrator which are guaranteed by the United States is governed by the principles set forth in my opinion to you of October 14, 1935.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

TAXATION OF MOTOR-VEHICLE FUELS SOLD ON FEDERAL RESERVATIONS IN TERRITORY OF HAWAII

Section 10 of the Act of June 16, 1936, 49 Stat. 1521, permits the Territory of Hawaii to levy taxes on motor-vehicle fuels sold, as provided therein, upon United States military or other reservations when such fuels are not for the exclusive use of the United States. The officers in charge of Federal reservations are required merely to report the amount of motor-vehicle fuels sold otherwise than for the exclusive use of the United States.

It lies with the territorial government and its appropriate officers to construe its laws and determine whether taxes are to be levied upon sales not for the exclusive use of the United States. Questions respecting the legality of taxes so levied would concern the territorial government and those subjected to the tax, and would not arise in the administration of the War Department.

An officer of the War Department chargeable with collecting the taxes and paying them over to the territorial government acts on behalf of the Territory under authority from the Congress. Such officer is not authorized to review the acts of other public officers whose duty it is to levy the taxes and for that purpose to interpret the laws; on the contrary, he should consult them if in doubt respecting the levy, collection, or payment of the taxes on sales of motor-vehicle fuels within the Federal reservation.

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DEPARTMENT OF JUSTICE,
September 21, 1936.

SIR: I have your letter of August 28, 1936, in which you request my opinion "as to whether the territorial fuel tax law of Hawaii imposes a tax on the sale of liquid fuel by commissaries and post exchanges in sales made other than for the exclusive use of the United States." You state that taxes on such sales are now being collected and temporarily impounded.

The question which you have submitted involves both the territorial laws of Hawaii and the following section of the Act of Congress approved June 16, 1936 (Pub. No. 686, 74th Cong.):

"SEC. 10. (a) That all taxes levied by any State, Territory or the District of Columbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory or the District of Columbia, within whose borders the reservation affected may be located.

"(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Terriory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel not sold for the exclusive use of the United States during the preceding month" [49 Stat. 1521].

The provisions of this Act are clear. The Territory of Hawaii is permitted by the Federal Government to levy taxes upon sales of motor vehicle fuels sold by or through the designated agencies located on United States military or other reservations when such fuels are not for the exclusive use of the United States. It is not authorized to levy taxes when such fuels are for the exclusive use of the United States. The officers in charge of Federal reservations are

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required merely to report the amount of such motor fuels sold otherwise than for the exclusive use of the United States.

It lies with the territorial government and its appropriate officers to construe its laws and to determine whether or not under them taxes are to be levied upon sales by or through such agencies located on such reservations of motor vehicle fuels which are not for the exclusive use of the United States. If the territorial officers levy such taxes, any question respecting the legality of the levy would be one concerning the territorial government and those subjected to the tax, rather than one arising in the administration of your Department.

While an officer of your Department may be chargeable with collecting and paying over to the appropriate territorial officers the taxes upon sales properly subject thereto, his function is only that of a collector, acting in behalf of the territory under authority from the Congress. An officer chargeable only with collecting taxes is not authorized to review the acts of other public officers whose duty it is to levy the taxes and for that purpose to interpret the laws. The principle is illustrated by the following statement of the court in *Smyth* v. *Titcomb*, 31 Me. 272, 285, 286, quoted in my opinion of August 16, 1935, to the Secretary of the Treasury [38 Op. 253]:

"A public officer entrusted with the collection and disbursement of revenue, in any of the departments of the government, has no right to refuse to perform his ministerial duties, prescribed by law, because he may apprehend that others may be injuriously affected by it, or that the law may, possibly, be unconstitutional. He is not responsible for the law, or for the possible wrongs which may result from its execution. He cannot refuse to act, because others may question his right. The individuals to be affected, may not doubt the constitutionality of the law; or they may waive their supposed rights or wrongs; or may choose to contest the validity of the enactment, personally. Public policy, as well as public necessity and justice, require prompt and efficient action from such officers."

My predecessors, by virtue of Section 356 of the Revised Statutes (U. S. C., Title 5, Sec. 304), have refrained from

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expressing opinions upon questions submitted by the head of a department but not actually arising in the administration of his department, and I do not feel at liberty to depart from the established practice. I therefore do not attempt to construe, either alone or in conjunction with the above-quoted Act of Congress, the territorial laws of Hawaii under which the officers of that territory may purport to levy taxes upon sales of motor vehicle fuels which are not for the exclusive use of the United States, whether sold "by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations," or otherwise; nor do I venture any opinion upon the validity or scope of such laws.

Of course, any attempt by the territorial authorities to tax such motor vehicle fuels sold or disposed of "for the exclusive use of the United States" might present a question requiring determination by proper officers of the Federal Government and might arise in the administration of your Department. However, since no such issue has been raised there is no occasion for dealing with it here. For the present it would seem that the persons conducting the agencies indicated in the statute, if in doubt regarding the levy, collection or payment of taxes upon sales of motor vehicle fuels, should consult the proper taxing authorities of the territory; and the officers in charge of the reservations where such agencies are located should submit to the territorial authorities the written statements prescribed by Section 10 (b) of the Act of June 16, 1936, hereinbefore quoted.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

TAXATION BY STATES OF MOTOR-VEHICLE FUELS SOLD IN NATIONAL PARKS

National parks are reservations within the meaning of Section 10 of the Hayden-Cartwright Act of June 16, 1936, which permits any state, territory, or the District of Columbia to tax motor-vehicle fuels when sold by or through post exchanges, ship stores,

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ship service stores, commissaries, filling stations, licensed traders, and other similar agencies located on United States military or other reservations when such fuels are not for the exclusive use of the United States; and by virtue of that Act the states may levy taxes on gasoline and other motor-vehicle fuels sold by concessioners located in national parks when such fuels are not for the exclusive use of the United States.

DEPARTMENT OF JUSTICE,
September 22, 1936.

SIR: I have your letter of August 19, 1936, requesting my opinion whether Section 10 of the Hayden-Cartwright Act approved June 16, 1936 (Public No. 686, 74th Cong.) authorizes the collection of State taxes on sales of gasoline and other motor vehicle fuels by concessioners operating within the limits of the national parks. Section 10 reads as follows:

"(a) That all taxes levied by any State, Territory or the District of Columbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory or the District of Columbia, within whose borders the reservation affected may be located.

"(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel not sold for the exclusive use of the United States during the preceding month." [49 Stat. 1521.]

The language of the section clearly states the purpose of the Federal Government to permit the States, the Territories, and the District of Columbia to levy taxes upon sales of motor vehicle fuels by or through the designated agencies located on United States military or other reservations when such fuels are not for the exclusive use of the United

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States. The question is whether national parks are reservations within the meaning of the words "military or other reservations" as used in the section.

National parks comprise areas of the public domain *reserved* and withdrawn under the laws of the United States from settlement, occupancy, or sale and dedicated and set apart as parks or pleasure grounds for the benefit and enjoyment of the public. Defining the meaning of the term "reservation", the Supreme Court in *United States* v. *Celestine*, 215 U. S. 278, 285, said that "the word is used in the land law to describe any body of land, large or small, which Congress has *reserved* from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide * * *."

It is true that some of the agencies which are expressly designated in Section 10 apparently are such as usually pertain to military, naval, or Indian reservations, and that the section does not expressly mention national parks. However, Section 5 of the Act does expressly refer to "national parks, and national monuments"; one amendment to the original Federal-Aid Road Act of 1916 (39 Stat. 355) clearly includes national forests within the term "reservations" (Act of May 21, 1928, 45 Stat. 683); and Section 3 of the final amendment, the Act here under consideration, pertains to unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations *other than forest reservations*. These provisions indicate that the Congress, in the Act as a whole, had in mind, and was dealing with, reservations generally, and there is no reason to assume that the comprehensive words "military or other reservations" in Section 10 were intended to exclude reservations of the character elsewhere mentioned in the Act.

The section of the Act under consideration effects a partial waiver of the exclusive jurisdiction of the United States under its land laws, and I cannot escape the conclusion that national parks are "reservations" within both the letter and the spirit of the Act.

The fact that the Congress has not used the word "concessioners" in enumerating the agencies through which motor vehicle fuels are sold on Government reservations is

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not controlling. It is to be observed that "filling stations", which obviously are capable of supplying a type of service that may be maintained either in connection with, or separate from, any of the other agencies mentioned, are enumerated co-ordinately with them; and that the words "and other similar agencies" relate as well to "filling stations" as to the other agencies which, like them, are particularized. I know of no reason why filling stations may not function in the national parks—indeed, I note that the form used by the Department of the Interior in contracting with concessioners in the national parks authorizes them to install and maintain "gasoline filling stations." Concessioners maintaining gasoline filling stations in the national parks would seem to fall precisely within the category of operators of "filling stations" or, at least, of "other similar agencies."

For these reasons, and having in mind the purposes of the Act as a whole, I conclude that concessioners located in the national parks, selling motor vehicle fuels, are located on United States reservations within the contemplation of Section 10 of the Hayden-Cartwright Act, and that by virtue of that section the States may levy taxes on sales of gasoline and other motor vehicle fuels by or through such concessioners when such fuels are not for the exclusive use of the United States.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

CITIZENSHIP OF NATIVES OF THE VIRGIN ISLANDS

Except as indicated, all persons born in the Virgin Islands who were absent from those Islands at the time of their annexation by the United States but were residing in the United States or any of its insular possessions or territories on June 28, 1932, are to be deemed citizens of the United States under the Act of February 25, 1927, 44 Stat. 1234, as amended.

DEPARTMENT OF JUSTICE,
October 15, 1936.

SIR: Under date of September 19 you requested my opinion concerning the citizenship of "natives of the Virgin

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Islands of the United States" who were absent from those islands at the time of annexation by the United States in January 1917, but were residing in "continental United States, the Virgin Islands of the United States, Puerto Rico, the Canal Zone, or * * * other insular possession or Territory of the United States" on June 28, 1932 (the date of the enactment hereinafter mentioned), and were not then citizens or subjects of any foreign country other than Denmark.

The treaty under which the United States acquired the Virgin Islands from Denmark (ratifications exchanged January 17, 1917, 39 Stat. pt. 2, pp. 1706, 1711) contained the following article:

"ARTICLE 6. Danish citizens residing in said islands may remain therein or may remove therefrom at will, retaining in either event all their rights of property, including the right to sell or dispose of such property or its proceeds; in case they remain in the Islands, they shall continue until otherwise provided, to enjoy all the private, municipal and religious rights and liberties secured to them by the laws now in force. If the present laws are altered, the said inhabitants shall not thereby be placed in a less favorable position in respect to the above mentioned rights and liberties than they now enjoy. Those who remain in the islands may preserve their citizenship in Denmark by making before a court of record, within one year from the date of the exchange of ratifications of this convention, a declaration of their decision to preserve such citizenship; in default of which declaration they shall be held to have renounced it, and to have accepted citizenship in the United States; for children under eighteen years the said declaration may be made by their parents or guardians. Such election of Danish citizenship shall however not, after the lapse of the said term of one year, be a bar to their renunciation of their preserved Danish citizenship and their election of citizenship in the United States and admission to the nationality thereof on the same terms as may be provided according to the laws of the United States, for other inhabitants of the islands.

"The civil rights and the political status of the inhabitants of the islands shall be determined by the Congress,

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subject to the stipulations contained in the present convention.

"Danish citizens not residing in the islands but owning property therein at the time of the cession, shall retain their rights of property, including the right to sell or dispose of such property, being placed in this regard on the same basis as the Danish citizens residing in the islands and remaining therein or removing therefrom, to whom the first paragraph of this article relates."

The question of citizenship is also dependent upon the Act of Congress of February 25, 1927, c. 192, 44 Stat. 1234, as amended by the Act of June 28, 1932, c. 283, 47 Stat. 336 (U. S. C., Title 8, Sec. 5b). The pertinent provisions of the amended statute are copied below:

"That the following persons and their children born subsequent to January 17, 1917, are hereby declared to be citizens of the United States:

"(a) All former Danish citizens who, on January 17, 1917, resided in the Virgin Islands of the United States, and are now residing in those islands or in the United States or Puerto Rico, and who did not make the declaration required to preserve their Danish citizenship by article 6 of the treaty entered into on August 4, 1916, between the United States and Denmark, or who, having made such a declaration, have heretofore renounced or may hereafter renounce it by a declaration before a court of record;

"(b) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in those islands, and are now residing in those islands or in the United States or Puerto Rico, and who are not citizens or subjects of any foreign country; and

"(c) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in the United States, and are now residing in the Virgin Islands of the United States, and who are not citizens or subjects of any foreign country.

"(d) All natives of the Virgin Islands of the United States who are, on the date of enactment of this subdivision, residing in continental United States, the Virgin Islands of the United States, Puerto Rico, the Canal Zone, or any other insular possession or Territory of the United States,

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who are not citizens or subjects of any foreign country, regardless of their place of residence on January 17, 1917." The last quoted paragraph (d) was added by the amendatory Act of June 28, 1932.

The Act of February 25, 1927, was passed by the Congress in order to remedy a situation described as follows by the advocates of the legislation:

"At the time it was understood by all that when the United States purchased these islands the citizenship of the inhabitants thereof was transferred to the United States.

"The Navy Department, who have been administering the islands ever since 1917, have always contended that this was the case. The State Department, however, have put a different interpretation upon the treaty, with the result that ever since 1917 the inhabitants of the Virgin Islands, formerly citizens of Denmark, have been people 'without a country.' Whatever the correct interpretation of the treaty may be, it has been admitted by all that there is a moral obligation on the part of the United States to confer United States citizenship on these inhabitants of the Virgin Islands formerly citizens and subjects of Denmark." [Mr. Kiess, in charge of the bill, 68 Cong. Rec. p. 3981.]

"It will be observed that this convention left in a somewhat vague situation the status of inhabitants of the Virgin Islands of the United States. Evidently legislative action by the Congress of the United States was contemplated by the framers of this convention and certainly by the people of the Virgin Islands." [Committee Report, 67 Cong. Rec. p. 9080.]

I am informed it has been the position of your Department (1) that the treaty with Denmark employed the word "citizens" in the broader sense of "nationals"; (2) that Danish nationals residing in the islands at the time of the annexation became nationals of the United States unless they made the declaration provided for in the treaty or took other effective means to preserve their Danish nationality; but (3) that admission to full rights of citizenship required legislation by the Congress. Similar views had prevailed concerning the status of the native inhabitants of the Islands acquired from Spain under the Treaty of Paris (30 Stat. 1754). Foreign Relations of the United States, 1900, pp. 894–895; 23 Op. 370, 371; 23 id. 400, 402.

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The treaty with Denmark prescribed, as a means to preserve Danish citizenship, the making of a declaration of intention within one year. It does not follow, however, that this was the only permissible means or, on the other hand, that the provision was applicable to all individuals affected by the annexation. It is stated in Hall on International Law (6th ed., note p. 567) that "treaties usually fail to deal with all the classes of persons which are affected by them."

Considering a similar provision for preserving Spanish nationality, contained in the Treaty of Paris, the Supreme Court concluded that a Spanish subject, "a native of the Peninsula," who left the Philippine Islands and returned to Spain, preserved his Spanish allegiance by merely leaving the ceded territory shortly after ratification of the treaty and remaining away until after the expiration of the year provided in the treaty for the making of declarations of intention. *Bosque* v. *United States*, 209 U. S. 91, 97. That treaty dealt with "natives of the Peninsula" and "native inhabitants" of the islands as distinct classes. *In re Bosque*, 1 Philippine 88, 90; Harvard Research in International Law, p. 66 (Special Sup. to vol. 23, American Journal of International Law). Hall, *supra*, recognizes such a distinction in international law, stating that there is a "presumption of changed nationality" against persons born within a ceded territory, whether present or absent at the time of the cession, but that this does not apply to persons born in another part of the ceding state—with respect to them the simple fact of withdrawal from the ceded territory is sufficient. The facts in *Bosque* v. *United States* being quite different and other principles being involved, the ruling in that case is not applicable here.

The Danish treaty alone is not fully determinative of the status of persons born in the Virgin Islands who had left them prior to the annexation and had established, or later did establish, residence in the United States and have never made any declaration of an intention to preserve Danish nationality. The exigencies, therefore, require an examination of the principles of international law bearing upon loss

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and acquisition of nationality in cases of annexation of territory.

It is authoritatively stated to be "a universally recognized customary rule of the law of nations that the inhabitants of subjugated as well as ceded territory lose their nationality and acquire that [but not necessarily full *citizenship*] of the state which annexes the territory", subject only to any option expressly given concerning retention of former nationality. Oppenheim, International Law, vol. 1, Secs. 219, 240, 301, 302; Hall, *supra*, pp. 565, 566; Halleck, International Law (1st ed.), p. 816; Westlake, International Law, pt. 1, p. 70; Keith, Theory of State Succession, p. 42; Harvard Research in International Law, *supra*, p. 60; *Campbell* v. *Hall*, 1 Cowper, 204, 208; *American Insurance Co.* v. *Canter*, 1 Pet. 511, 542; *Boyd* v. *Thayer*, 143 U. S. 135, 162. While the rule, as indicated, is beyond dispute, its application to particular classes, dependent upon presence in or absence from the affected territory, nativity, domicile, etc., is difficult and divergent.

Your concern, however, is only with *natives* of the Virgin Islands, and the authorities are in accord in applying the rule to natives, nationals of the ceding state, who are domiciled in the ceded territory and actually present therein at the time of the cession. If absent, they are at least "*prima facie* comprised in the cession" (Westlake, p. 72), and are affected by "a presumption of changed nationality" (Hall, p. 568). According to Keith (p. 42), cession *ipso facto* alters the nationality of such absent persons "if they return * * * soon after the cession."

The authorities cited do not deal specifically with persons who are absent at the time of the cession but are within other territory *of the annexing nation*, or later come within such other territory, although Keith (p. 46) states that it would be within the discretion of a conqueror "to accept as subjects persons who, having been subjects of the preceding state, without now residing in it or returning to it, might apply for his protection."

Secretary of State Hay adopted the view that, while the treaty by which Spain ceded Puerto Rico to the United States in 1899 made no provision for natives not actually dwelling within the ceded island, "it cannot be presumed

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that native inhabitants of Puerto Rico temporarily sojourning for a brief time in another country thereby abandon their status as such inhabitants." American diplomatic and consular officers were instructed to register Puerto Ricans living abroad and to give them official protection. An applicant for registration was required to establish by satisfactory evidence that he "is in fact a native inhabitant of * * * Puerto Rico; that he has not lost that quality by naturalization in any other country or by assuming therein obligations inconsistent with his original allegiance; and * * * that it is his purpose in good faith either to return to his native territory to reside or to come to the United States, with a view in either case to availing himself of the privilege of citizenship which may be hereafter established by Act of Congress." Foreign Relations of the United States, 1900, pp. 894–895.

The views thus adopted by the Secretary of State are in accord with the views of the Attorneys General of that period. Attorney General Griggs (23 Op. 370, 371; id. 400, 402) concluded that the native inhabitants by virtue of the treaty became, "from an international standpoint, subjects of the United States," and that by virtue of an Act of Congress they became "citizens of Puerto Rico," but distinguishable from "citizens of the United States" in matters of domestic concern.

Attorney General Knox (24 Op. 40, 43), in an opinion concerning a native of Puerto Rico temporarily living in France at the time of the annexation (April 11, 1899) and still in France when the opinion was rendered (May 13, 1902), stated the following conclusion—later quoted with apparent approval by the Supreme Court in *Gonzales* v. *Williams*, 192 U. S. 1, 15:

"But even in supposing that a native Puerto Rican like Mr. Molinas, temporarily absent at the date of the treaty, has been unintentionally omitted from section 7 [of the Act conferring Puerto Rican citizenship], he is undoubtedly one of those turned over to the United States by Article IX of the treaty to belong to our nationality. He is also clearly a Puerto Rican; that is to say, a permanent inhabitant of that island, which was also turned over by Spain to the United States. As his country became a domestic

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country and ceased to be a foreign country within the meaning of the tariff act above referred to, and has now been fully organized as a country of the United States by the Foraker Act, it seems to me that he has become an American, notwithstanding such supposed omission."

It seems reasonable to conclude that a person temporarily absent from ceded territory affected by a treaty such as that with Spain or that with Denmark, who has not lost the quality of a native inhabitant by naturalization in another country, or by assuming obligations inconsistent with his original allegiance, or by expatriating himself in any other manner, is within the class of persons whose allegiance is transferred—at least if he submits himself to the jurisdiction of the new sovereign. The authorities usually speak of *returning to the ceded territory*, but if the true status and intention of the individual be established the actual return would seem to be important only as evidencing his submission to the new sovereign and this would be indicated equally by his entry into other territory of the annexing state.

Secretary Hay and Attorney General Knox held that acquisition of American nationality did not depend on prior return to the ceded territory by natives living temporarily in foreign countries. The Secretary expressly recognized that an absent Puerto Rican, by coming into any part of our territory, might submit himself to our jurisdiction and to the operation of any citizenship statutes which the Congress might enact. If, instead, he were already in this country at the time of the cession and remained here, the same rule would seem to be applicable.

A letter from the Governor of the Virgin Islands, submitted by you, indicates that some natives living abroad at the time of the annexation were granted Danish passports by Danish consular representatives in order to enable them to return to the Virgin Islands, but the Governor states, "it is understood that this was done with considerable protest on the part of the Danish consular representatives and only after it was ascertained that it was impossible for such persons to travel without some sort of identification papers"—which affords some indication that Denmark no longer regarded such natives as citizens or subjects.

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Section 1 (d) of the Act of Congress here involved conferred citizenship only upon "*natives* of the Virgin Islands," explained in the Committee Report (H. Rept. 1114, 72d Cong. 1st Sess.) as contemplating persons "born in the Virgin Islands," and this is the common meaning of the word "natives." The paragraph applies, therefore, only to persons who had been born in the Virgin Islands *and* were residing in the United States (including the possessions and territories) on June 28, 1932. The power existed in this government to confer citizenship upon such persons, and the legislative history of the statute indicates that the Congress, in fact, intended to confer citizenship upon them.

The Congress must be charged with knowledge of the principles of international law and of the precedents which had been established. (See Opinion Dec. 7, 1935, to Secretary of the Treasury, 38 Op. 385.) Having in mind the language of the treaty, the language of the statute and the apparent purpose intended to be accomplished, the conclusion is required that the Congress acted in the light of and approved the view that the natives of the Virgin Islands, nationals of Denmark at the time of the annexation, who were residing in the United States (including the territories and possessions) at the time the amendatory Act was passed in 1932, and who had not in some affirmative manner preserved their Danish nationality, had lost their status as citizens or subjects of Denmark and hence were not included within the words of the proviso, "citizens or subjects of any foreign country." Indeed, the acceptance of this view was essential to the accomplishment of the intended result (perhaps of any result whatever) under the language employed in the statute.

Upon the foregoing premises it is my opinion that all persons born in the Virgin Islands of the United States who were absent from those islands at the time when they were annexed by the United States but were residing in continental United States, the Virgin Islands of the United States, Puerto Rico, the Canal Zone or any other insular possession or territory of the United States, on June 28, 1932, are to be deemed citizens of the United States by virtue of the Act of February 25, 1927, as amended by the Act of

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June 28, 1932, excepting, however, all persons who preserved their Danish nationality through authorized declaration of intention or other effective means recognized in international law, and all persons who have acquired the nationality of any other foreign country.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF STATE.

LICENSE TO PRIVATE CORPORATIONS UNDER GOVERNMENT-OWNED PATENT TO MANUFACTURE AND SELL LIFE-LINE PROJECTILES

The Secretary of the Treasury is authorized to grant a revocable, nonexclusive, and nontransferable license to a private corporation to manufacture and sell a life-line projectile covered by a Government-owned patent, either upon an expressly stated consideration or upon a determination that the issuance of the license would further a public interest.

DEPARTMENT OF JUSTICE,
November 2, 1936.

SIR: I have your letter of October 16 in which you request my opinion as to the legality of a proposal "gratuitously to license a private corporation to avail itself of a government-owned patent in the manufacture and sale of life-line projectiles."

As pointed out in my opinion of March 9, 1936, to the President [38 Op. 425], Attorney General Stone, in an opinion of October 28, 1924, (34 Op. 320, 328, 329) held that the Secretary of the Navy was authorized "to grant a revocable, nonexclusive and nontransferable license to a private person to make, use and sell apparatus embodying inventions covered by patents owned by the United States." The Secretary had requested an opinion as to his authority to issue licenses "provided it can be done in a manner not objectionable *and adequate consideration for licenses is received* to make the agreements valid"; and the Attorney General referred to "*the consideration proposed*"—the grant to the United States of a similar right under a patent owned by the licensee. He mentioned a past practice under which "numerous licenses * * * had been granted for the use

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of patented inventions owned by the Government," but also relied upon several opinions of the Attorneys General in which it had been concluded that the heads of the departments were authorized to issue revocable licenses for the use of real property owned by the Government. (16 Op. 152; 19 Op. 628; 21 Op. 473; 22 Op. 240, 245; 30 Op. 470, 483.)

In the opinions cited the view was clearly set forth that some public interest must be served in order to warrant the issuance of a license. In one of them (22 Op. 241, 245) Attorney General Griggs unequivocally stated that the custom of licensing private persons to use Government land without express authority from the Congress "cannot be maintained upon any ground except benefit to the public interests, either directly or indirectly." However, as pointed out by Attorney General Gregory (30 Op. 470, 482)—

"The inherent limitation upon it, namely, that the trespass authorized must subserve some purpose useful or beneficial to the Government itself, is one that goes to the mode of exercise rather than to the existence of the power. Whether, as in this case, the determinable occupancy of the land in question is or is not a benefit to the Government in respect of that land or in respect of other property or interests under your control is a question for the exercise of the judgment of the official vested with the power rather than a question of law to be determined in advance by the law officers of the Government."

In my opinion of July 11, 1933 (37 Op. 180), regarding the authority of the Secretary of the Interior to grant licenses to commercial interests under the so-called Mills patent, no express reference was made to the presence or absence of a public interest. The Mills patent had been assigned by the owner to the Secretary of the Interior, "as trustee * * * in trust for the use and benefit of the people of the United States" with express authority "to grant licenses * * * to such party or parties and upon such terms and conditions as said trustee * * * may deem proper"—and this did not contemplate the granting of licenses to the United States, for the patent had been obtained by an employee of the Government under the Act of March 3, 1883, c. 143, 22 Stat. 603, 625 (U. S. C., Title 35, Sec. 45), without payment of fees, and the right of the

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United States to use the invention was fixed by that Statute. (32 Op. 145; Op. January 14, 1936 [38 Op. 402]). *In addition*, the employee executed the assignment and provided therein for commercial use of the invention by the people of the United States upon appointments by the trustee. The assignment now under consideration was made to the "Government of the United States, as represented for the purpose hereof by the Secretary of the Treasury, * * * to be held and enjoyed by the said Government of the United States, for its own use and behoof," and it was not made subject to any expressly stated trust or condition. Therefore, the opinion of July 11, 1933, is not controlling here.

Based upon the foregoing, it is my opinion that you are authorized to grant a revocable, nonexclusive and nontransferable license to a private corporation to manufacture and sell the life-line projectiles either upon some expressly stated consideration or upon a determination by you that the issuance of the license would further a public interest, within the principles set forth in the opinions hereinbefore mentioned, but not otherwise without enabling legislation.

Respectfully,

GOLDEN W. BELL,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

LEGAL STATUS OF ORDINANCE REPASSED BY LOCAL COUNCIL OF ST. THOMAS AND ST. JOHN, VIRGIN ISLANDS, AFTER VETO BY GOVERNOR

The provision in the Act of June 22, 1936, 49 Stat. 1807, for a merely suspensive veto by the Governor of the Virgin Islands of bills passed by the local legislative bodies, with subsequent presentation of the bills to the President for approval or disapproval, will become effective only with respect to the bills passed by the new legislative bodies provided for in that Act.

The action of the Council of St. Thomas and St. John in passing an ordinance again on October 8, 1936, after veto by the Governor was without legal effect.

DEPARTMENT OF JUSTICE,
December 8, 1936.

SIR: I have your letter of November 24, requesting my opinion concerning the legal status of an "Ordinance Pro-

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viding for the Assessment, Levy, and Collection of Taxes on Real Property", which was passed by the local Council of St. Thomas and St. John, Virgin Islands of the United States, on August 24, 1936, and vetoed by the Governor, but was passed again by a unanimous vote of the Council on October 8, 1936. You state that the Governor has sent the bill to you for transmittal to the President, for his approval or disapproval if such action is legally proper.

As you have indicated, if the matter is governed by the Act of March 3, 1917, c. 171, Sec. 2, 39 Stat. 1132 (U. S. C., Title 48, Sec. 1392) and Executive Order No. 2777 of December 26, 1917, issued thereunder, the Governor's veto was final and the subsequent action of the Council without legal effect. However, consideration is required of the following provisions contained in the Act of June 22, 1936, c. 699, 49 Stat. 1807, providing "a civil government" for the Virgin Islands:

"SEC. 6. All local legislative powers in the municipality of Saint Thomas and Saint John, except as herein otherwise provided, shall be vested in a local legislative assembly which shall be designated the 'Municipal Council of Saint Thomas and Saint John.' Said council shall consist of seven members elected by the qualified electors of the municipality for a term of two years beginning the 1st day of January next succeeding the date of election. * * *"

"SEC. 8. The present colonial councils shall continue to function until January 1, 1937. The next general election in the Virgin Islands shall be held on November 3, 1936. At such election there shall be chosen the entire membership of each municipal council as herein provided. Thereafter the elections shall be held on the first Tuesday after the first Monday in November, beginning with the year 1938, and every two years thereafter. The terms of office of members of the respective colonial councils of the municipalities of Saint Thomas and Saint John and of Saint Croix, whose terms of office under existing law would expire prior to January 1, 1937, are hereby extended to that date."

"SEC. 16. New legislation, and repeals, alterations, and amendments of local laws of the Virgin Islands by the municipal council having jurisdiction, and by the legislative

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assembly, shall be effective and enforced when, and to the extent, such new legislation, repeals, alterations, and amendments are approved by the Governor * * *. If any bill passed by the municipal council having jurisdiction or by the legislative assembly be disapproved in whole or in part by the Governor, the Governor shall within thirty calendar days return such bill to the said municipal council or to the legislative assembly, whether in actual session or not, setting forth his objections. If after reconsideration by the legislative body having jurisdiction two-thirds of all the members of the said body pass such bill or part thereof, it shall be sent to the Governor who, in case he shall not then approve it, shall transmit the same to the President. If the President approves such bill or part of bill, he shall sign it and it shall become law; if he does not approve such bill or part of bill, he shall return it to the Governor, so stating, and it shall not become law. If any bill shall not be returned by the Governor as herein provided within thirty calendar days after it shall have been presented to him the same shall become a law in like manner as if he had signed it. The President shall approve or disapprove an act submitted to him under the provisions of this section within three months from and after its presentation for his approval; and if not acted upon within such time, it shall become a law the same as if it had been specifically approved. * * *"

"SEC. 40. This Act shall take effect upon its enactment, but until its provisions shall severally become operative as herein provided, the corresponding legislative, executive, and judicial functions of the existing government shall continue to be exercised as now provided by law or ordinance, and the present incumbents of all offices under the Government of the Virgin Islands shall continue in office until their successors are appointed and have qualified unless sooner removed by competent authority."

I agree with the conclusion of your Solicitor that the provision in the Act of June 22, 1936, for a merely suspensive veto by the Governor, with subsequent presentation of the matter to the President for his approval or disapproval, will become effective only with respect to bills passed by the new legislative bodies provided for in that Act and that, there-

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fore, the action of the present Council of St. Thomas and St. John in passing the Ordinance again on October 8, 1936, after the veto by the Governor, was without legal effect. I recommend, however, in order to eliminate any possible doubt concerning the status of this bill as effective legislation that it be presented to the President, together with a copy of this opinion, and that he return the bill to the Governor without his approval within the three-month period specified in the Act of June 22, 1936. The President may deem it advisable to transmit a copy of this opinion to the Governor and to state that in view of the opinion he is returning the bill without his approval.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE INTERIOR.

APPLICABILITY OF ROBINSON-PATMAN ACT TO GOVERNMENT CONTRACTS FOR SUPPLIES

The Robinson-Patman Act of June 19, 1936, which makes it unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities in the circumstances therein stated, is not applicable to Government contracts for supplies.

DEPARTMENT OF JUSTICE,
December 28, 1936.

SIR: I have your letter of October 30, requesting my opinion concerning the application of the Robinson-Patman Act (approved June 19, 1936, c. 592, 49 Stat. 1526) to government contracts for supplies.

The statute reads, in part, as follows:

"Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

"SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities *of like grade and quality, where either or any of the purchases involved in such dis-*

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crimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:* Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." [Italics supplied.]

Aside from the proviso, the above quoted portion of the statute differs from Section 2 of the Act of October 15, 1914, in no respect save as indicated by the underscored words, which did not appear in the earlier statute. The language of the proviso is different from that of the corresponding proviso in the earlier statute, but the change does not bear upon the question which you have submitted.

In my opinion of April 20, 1936 [38 Op. 452], to the Secretary of War concerning contracts with motor vehicle carriers, it was pointed out that statutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. As Mr. Justice Brandeis observed in *Emergency Fleet Corporation* v. *Western Union Telegraph Company*, 275 U. S. 415, 425, "it may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the Government preferential rates."

The Act of June 19, 1936, merely amended the Act of October 15, 1914, as above pointed out, and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts. The practice in this respect indicates that it has been customary in the past for those dealing with the various agencies of the Federal Government to grant to them special prices on contracts for

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supplies. Such prices are often below the regular market for similar material supplied to the regular trade—due, perhaps, to an estimated lower cost of doing business with the Government because of quantity purchases and absence of credit risk, solicitation expense, etc., although it may often be impossible to evaluate such factors with exactness.

It has been suggested that the force which would ordinarily be attributed to this practice may be weakened because of the probability that the prices named have seldom, if ever, violated the statute, even assuming its application. Perhaps this is true. It is also conceivable that if the past practice is maintained the prices hereafter named to the Government will seldom, if ever, violate the amended statute, likewise assuming its application; and this would seem to supply another reason for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters, in the absence of any clear indication that it intended to depart from that policy in this instance.

It is therefore my opinion that the Act of October 15, 1914, as amended by the Act of June 19, 1936, is not applicable to Government contracts for supplies.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

TRANSFER OF DRUG ADDICTS TO NARCOTIC FARMS UPON CONVICTION OF CRIME

The act of January 19, 1929, 45 Stat. 1086, does not require that narcotic addicts convicted of offenses against the United States shall be confined in a penal institution as a condition precedent to their being sent to the Public Health Service Hospital at Lexington, Kentucky, but such addicts may be transferred directly from the convicting courts to the hospital.

DEPARTMENT OF JUSTICE,
January 6, 1937.

SIR: Reference is made to your letter of December 29, 1936, requesting my opinion upon the question whether Section 7 of the Act of January 19, 1929, 45 Stat. 1086 "requires that narcotic addicts convicted of offenses against

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the United States be confined in a penal institution as a condition precedent to their being sent to the United States Public Health Service Hospital, Lexington, Kentucky, or whether it permits such narcotic addicts to be sent from the courts in which they are convicted directly to such hospital."

That Act authorized the establishment of two United States narcotic farms, and the United States Public Health Service Hospital, Lexington, Kentucky, was organized as one of them. The pertinent part of Section 7 of the Act provides:

"That the authority vested with the power to designate the place of confinement of a prisoner is hereby authorized and directed to transfer to the United States narcotic farms, as accommodations become available, all addicts, as herein defined, who are now or shall hereafter *be sentenced to confinement in or* be confined in any penal, correctional, disciplinary, or reformatory institution of the United States, including those addicts convicted of offenses against the United States who are confined in State and Territorial prisons, penitentiaries, and reformatories: * * *." [Italics supplied.]

It will be observed that the statute authorizes the transfer to a narcotic farm not only of addicts who are "confined in" penal institutions, but also of addicts who have been "sentenced to confinement in" such institutions. To construe the statute, therefore, as authorizing the transfer to narcotic farms of such addicts only as are actually confined in penal institutions would be to render superfluous and without meaning or effect the words "*be sentenced to confinement in or*", contrary to the familiar principle well expressed in Ex Parte the Public National Bank of New York, 278 U. S. 101, 104:

"No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Market Co.* v. *Hoffman*, 101 U. S. 112, 115."

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While the statute authorizes the Government officers whose duty it is to designate the place of confinement of a prisoner, subject to the provisions of the Act, "*to transfer*" addicts to the United States narcotic farms, the use of the word "transfer" is entirely consistent with a construction giving effect to the first alternative in the clause under consideration. One of the definitions of the term "transfer" is "to convey from one place or person to another; to transport, remove, or cause to pass, to another place or person * * *." *Webster's New International Dictionary, 1934.* It is my opinion, therefore, that narcotic addicts convicted of offenses against the United States may be transferred directly from the courts in which they are convicted to the Hospital, and that the statute does not require that addicts convicted of offenses against the United States shall be confined in a penal institution as a condition precedent to sending them to the Hospital.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

SALE OF LOW-COST HOUSING OR SLUM-CLEARANCE PROJECTS

The Federal Emergency Administrator of Public Works is without authority, in view of Section 4 (a) of the Act of June 29, 1936, 49 Stat. 2026, to sell certain slum-clearance or low-cost housing projects in New York City upon a proposed basis of 55 per cent or more, of cost plus interest.

DEPARTMENT OF JUSTICE,
January 13, 1937.

SIR: I have your letter of November 4, 1936, enclosing a letter from the Federal Emergency Administrator of Public Works in which he states that he contemplates selling to the New York City Housing Authority two slum-clearance or low-cost housing projects in the city of New York at a price not less than 55 per centum of the cost of the projects plus interest. You request my opinion upon the question of his authority to make such sale.

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In his letter the Administrator quotes Section 4 of the Act of June 29, 1936, 49 Stat. 2025, 2026, which provides:

"SEC. 4 (a) In the administration of any low-cost housing or slum-clearance project described in section 1, the Federal Emergency Administrator of Public Works shall fix the rentals at an amount at least sufficient to pay (1) all necessary and proper administrative expenses of the project; (2) such sums as will suffice to repay, within a period not exceeding sixty years, at least 55 per centum of the initial cost of the project, together with interest at such rate as he deems advisable.

"(b) Dwelling accommodations in such low-cost housing or slum-clearance projects shall be available only to families who lack sufficient income, without the benefit of financial assistance, to enable them to live in decent, safe, and sanitary dwellings and under other than overcrowded housing conditions: *Provided*, That no family shall be accepted as a tenant in any such project whose aggregate income exceeds five times the rental of the quarters to be furnished such family. The term 'rental' as used in this subsection includes the average cost (as determined by the Federal Emergency Administrator of Public Works) of heat, light, water, and cooking, where such services are not supplied by the lessor and included in the rent."

The Administrator then states in part:

"I am now constructing two slum clearance and low-cost housing projects in the City of New York, New York, known as the Ten Eyck Houses No. H–1301 and Harlem River Houses No. H–1302. These projects are being constructed with moneys provided under the Emergency Relief Appropriation Act of 1935. Instead of directly operating these two projects, I would like to sell them to the New York City Housing Authority subject to conditions and limitations which would require the use and operation of said projects by the Authority in accordance with the provisions of Section 4 (b) quoted above.

"* * * Section 4 (b) of that Act, quoted above, requires that the projects be made available solely to families who cannot afford private dwelling accommodations, and provides specifically that no family shall be admitted as a

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tenant whose income exceeds five times the rental. It seems reasonable to infer that Congress intended these limitations of Section 4 (b) to apply to sales of housing projects pursuant to powers already vested in me, for the language of the Act permits such a construction and this would assure that the purpose of Congress with respect to these projects would be carried out in such instances.

* * * * *

"In view of this evident intention of Congress that the slum clearance and low-cost housing projects should be used solely to provide dwelling accommodations for families of low income, it would seem that I could exercise the powers otherwise conferred upon me in order to carry out this purpose. Under Title II of the National Industrial Recovery Act I am empowered to 'acquire * * * any real or personal property in connection with the construction of any such project, and to sell * * * any property so constructed or acquired or to lease any such property with or without the privilege of purchase.' That Act contains no express provision regarding the price at which such public works projects may be sold by me.

"In order to carry out the intention of Congress with respect to the use of such projects, it is necessary, in the event of a sale thereof to the New York City Housing Authority, that the price be less than the total cost of the project so that said Authority may be able to make the dwelling accommodations in such projects available to families of low income (selected as required by Section 4 (b) of Public Act No. 837) at rentals within their financial reach. I contemplate selling these projects to the New York City Housing Authority for at least 55 per centum of the cost of the project, plus interest, such sale to be subject to proper conditions and reservations to assure that the dwelling accommodations in the project will be rented only to families of low income. It should be noted that the New York City Housing Authority was created with the object of accomplishing the same purposes as those contemplated by Congress and that it is authorized by State law to undertake only housing projects for those in the low-income group. Fur-

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thermore, the terms of sale would specifically impose upon the New York City Housing Authority all of the duties prescribed by Section 4 (b) of Public Act No. 837 with respect to rental rates and tenancy.

* * * * *

"A sale of these slum clearance and low-cost housing projects to the New York City Housing Authority at a price of at least 55 per centum of the cost of the project (plus proper interest) would result in the repayment to the Government contemplated by Public Act No. 837 and would at the same time assure that the project would be used for the purposes prescribed in said Act.

"* * * in case the New York City Housing Authority itself had constructed one of these housing projects, it is clear that I could have directly made a grant to the Authority of 45 per centum of the cost of the project. It would seem that I should be able to accomplish the same object by constructing the project myself and then selling it to this public housing authority at a price which would allow a grant in the same amount as I could have otherwise given. * * *

"It should be noted that the consideration which the Government would receive upon a sale of these projects to the New York City Housing Authority would be at least equal to the normal loan which I would have made to the Authority under the Emergency Relief Appropriation Act of 1935. * * *"

The pertinent provisions of Title II of the National Industrial Recovery Act (c. 90, 48 Stat. 200) are as follows:

"SEC. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: * * * (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; * * *." (U. S. C., Title 40, Sec. 402.)

"SEC. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies

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as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, *but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project;* (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and *to sell* any security acquired or *any property* so constructed or acquired or to lease any such property with or without the privilege of purchase: * * *." (U. S. C., Title 40, Sec. 403.) [Italics supplied.]

Under the provisions of the Emergency Relief Appropriation Act of 1935 (c. 48, 49 Stat. 115, 119), which extended Title II of the National Industrial Recovery Act, grants to public agencies were authorized without the 30 per centum limitation provided in the original Act and the Administrator adopted the practice of making such grants on the basis of not more than 45 per centum of the cost of the project. Later this formula was specifically authorized by the Congress in Title II of the First Deficiency Appropriation Act of 1936 (c. 689, 49 Stat. 1597, 1609).

I am unable to agree with the conclusion reached by the Administrator that the provisions of the National Industrial Recovery Act and of the First Deficiency Appropriation Act of 1936 authorizing him "to make grants to States, municipalities, or other public bodies for any construction, repair, or improvement of" slum-clearance or low-cost housing projects to the extent of 45 per centum of the cost of such projects, are authority for him to sell a project of this kind constructed by him to a State, municipality, or other public body at a price of 55 per centum of the cost thereof. The Section giving the Administrator authority to make grants in connection with the construction of such projects expressly states that this authority is given "with a view to increasing employment quickly." It is a reasonable presumption that the making to a State or municipal-

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ity of a grant of 45 per centum of the cost of such a project will tend to induce such State or municipality to undertake the project, and that thereby increased employment would be quickly provided. I am unable to see, however, how a sale of a project already completed could produce any such result.

It is true, as pointed out by the Administrator, that the National Industrial Recovery Act authorizes the Administrator to sell or lease any property acquired in connection with the construction of slum-clearance or low-cost housing projects. The Act contains no express provisions governing the sales price of such projects. It may be, therefore, that prior to the Act of June 29, 1936, Section 4 of which is quoted by the Administrator, there was ground for argument that the statutes gave to the Administrator the discretion to fix the sales price of projects constructed by him at a figure below the cost to the Government. However, any such construction would now seem to be precluded in view of the provisions of Section 4 (a) of that Act. By enacting Section 4 (a) and therein authorizing the Administrator to fix a minimum rent rate of such projects below the cost of the projects to the Government, the Congress has, in effect, determined that the Administrator did not possess such authority under the prior statutes. Any other conclusion would make the Section meaningless. It is significant that prior to the enactment of Section 4 (a) the Administrator's authority to lease and his authority to sell were on a common basis, and that while said Section authorizes the Administrator to fix rentals on a basis of 55 per centum of the cost, it contains no provision authorizing the Administrator to *sell* below cost. Failure to make such provision leads to the conclusion that the Congress did not intend to vest the Administrator with such authority; and this conclusion is supported by the legislative history of the Act. As originally introduced the bill contained provisions authorizing the Administrator to sell or rent projects upon such conditions as he might determine, but before the bill was finally enacted into law the provisions relating to the sale of projects were eliminated entirely and the provisions relating to rentals were qualified by the 55 per centum limitation.

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It is my opinion, therefore, in view of the present state of the law, that the Administrator is without authority to consummate the sale in question on the basis proposed, and, if such a sale is desirable, I recommend that the matter be referred to the Congress for appropriate legislation.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

EFFECT OF ACT OF AUGUST 27, 1935, PROVIDING FOR DISPOSITION OF SURPLUS REAL PROPERTY, UPON CERTAIN EARLIER ACTS AUTHORIZING ACQUISITION OF LAND FOR RECLAMATION PURPOSES

The Acts of February 2, 1911, and May 20, 1920, authorizing the Secretary of the Interior to sell, under certain conditions, lands acquired or withdrawn for irrigation purposes are not repealed by the Act of August 27, 1935, providing for the disposition, control, and use of surplus real property acquired by Federal agencies.

DEPARTMENT OF JUSTICE,
January 25, 1937.

SIR: Reference is made to your letter of September 24, 1936, in which you request my opinion upon the question hereinafter stated.

The facts prompting you to seek my opinion may be summarized as follows:

The Bureau of Reclamation has recommended that you approve the appraisal of four designated tracts of farm land preparatory to the sale thereof under the authority of certain statutory provisions hereinafter set out. One of the tracts in question was acquired by purchase under Section 7 of the Reclamation Act of June 17, 1902 (32 Stat. 388), for use in connection with the Lower Yellowstone Federal Irrigation Project, in Eastern Montana and Western North Dakota. The other three tracts are public lands withdrawn from entry for the same project under Section 3 of that Act. Both the tracts acquired by purchase and the improvements made upon the public tracts were paid for out of the "reclamation fund" established by Section 1 of the same Act.

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The Act of February 2, 1911, c. 32, 36 Stat. 895, authorizes the Secretary of the Interior to sell, in the manner therein provided, lands "acquired" under the Reclamation Act for irrigation purposes and no longer needed therefor. The pertinent part of the 1911 Act is as follows:

"That whenever in the opinion of the Secretary of the Interior any lands which have been acquired under the provisions of the Act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), commonly called the 'reclamation Act,' or under the provisions of any Act amendatory thereof or supplementary thereto, for any irrigation works contemplated by said reclamation Act are not needed for the purposes for which they were acquired, said Secretary of the Interior may cause said lands, together with the improvements thereon, to be appraised by three disinterested persons, to be appointed by him, and thereafter to sell the same for not less than the appraised value at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and by publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land.

* * * * *

"SEC. 3. That the moneys derived from the sale of such lands shall be covered into the reclamation fund and be placed to the credit of the project for which such lands had been acquired."

The Act of May 20, 1920, c. 192, 41 Stat. 605, similarly provides for the sale of "public" lands withdrawn for irrigation purposes under the Reclamation Act and no longer needed for such purposes, and also for covering the money derived from the sale into the reclamation fund.

It appears that the lands in question are no longer needed for the purposes for which they were acquired or withdrawn, and that you desire to sell them and make conveyance thereof in accordance with the provisions of the said Acts of February 2, 1911, and May 20, 1920. However, because of the provisions of the Act of August 27, 1935, entitled "An Act To provide for the disposition, control, and use of surplus real property acquired by Federal agencies, and for other purposes" (49 Stat. 885), the question

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has arisen whether you still have authority to dispose of the lands under the earlier Acts. It is upon this question that you desire my opinion.

Section 1 of the Act of August 27, 1935, provides:

"That notwithstanding any other provisions of law, whenever any real property located outside of the District of Columbia, exclusive of military or naval reservations, heretofore or hereafter acquired by any Federal agency, by judicial process or otherwise in the collection of debts, purchase, donation, condemnation, devise, forfeiture, lease, or in any other manner, is, in whole or in part, declared to be in excess of its needs by the Federal agency having control thereof, or by the President on recommendation of the Secretary of the Treasury, the Director of Procurement, with the approval of the Secretary of the Treasury, is authorized (a) to assign or reassign to any Federal agency or agencies space therein: *Provided*, That if the Federal agency to which space is assigned does not desire to occupy the space so assigned to it, the decision of the Director of Procurement shall be subject to review by the President; or (b) pending a sale, to lease such real property on such terms and for such period not in excess of five years as he may deem in the public interest; or (c) to sell the same at public sale to the highest responsible bidder upon such terms and after such public advertisement as he may deem in the public interest."

Section 2 of that Act provides in part, that the Director of Procurement may repair or alter any such property deemed useful for a Federal agency and charge the cost thereof to the agency to which space in the property is assigned. Section 3 authorizes the Director to procure space by lease, for periods not in excess of five years, for the housing of Federal agencies outside of the District of Columbia, and to assign and reassign space therein as authorized in Section 1 and to require payment of repair and alteration costs as provided in Section 2.

The 1911 and 1920 Acts are not mentioned in the 1935 Act, and it is obvious that you still have the authority to dsipose of the lands in accordance with the provisions of the earlier Acts unless those Acts have been impliedly repealed by the later Act.

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The legislation in the earlier Acts is special. Those Acts are concerned only with the sale of lands acquired or withdrawn for reclamation purposes under the Reclamation Act. The 1935 Act is general legislation. It is not limited to any particular class of property or to property acquired by the Government for a particular purpose, but provides for the disposition by sale, lease, or rental of excess real property generally.

In these circumstances, applying the rule of construction that an earlier special statute will not be regarded as impliedly repealed by a later general statute upon the same subject-matter unless the two acts are absolutely incompatible and cannot stand together, I find nothing in the language of the 1935 Act that is necessarily inconsistent or incompatible with the language of the earlier Acts.

It is clear from an examination of the 1935 Act as a whole that its cardinal purpose is to provide a practical and economical method whereby property which is no longer needed for the administrative purposes of one Government agency may be made available for the administrative needs of other Government agencies. This object is confirmed by the legislative history of the Act, as shown by the following excerpt from the Committee Report accompanying the bill (Report No. 1004, 74th Cong., 1st Sess., of Senate Committee on Public Buildings and Grounds):

"The bill has for its purpose the furthering of economy by a more judicious use of surplus Government-owned real property and Government-leased space located outside of the District of Columbia, exclusive of military or naval reservations. It seeks to eliminate the rental of space by governmental agencies at a time when other space which could be used satisfactorily by such agencies is lying idle in some Government-owned or leased property. It further aims at turning idle Government property into revenue by authorizing its sale or rental.

* * * * *

"In view of the rapid increase in surplus Government properties resulting from the comprehensive Federal public-building program, and in view of the creation and establishment throughout the United States of numerous Federal agencies requiring space, the need for the proposed

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measure is pressing. At the present time the control and allotment of space within the District of Columbia is centralized in the National Park Service of the Department of Interior, with resulting economy and efficiency in the administration of such space, and it is believed that a similar centralization of the control of real property located outside of the District of Columbia is equally necessary."

The provisions of the 1911 and 1920 Acts are an integral part of a well-considered plan for the reclamation of arid or semi-arid lands by irrigation provided by Congress in the Reclamation Act. Section 1 of that Act provides that all proceeds from the sale and disposal of public lands in the sixteen western States therein mentioned shall be reserved and appropriated as a special fund (the "reclamation fund") to be used in the construction and maintenance of irrigation works in those States. Section 4 of the Act prescribes, among other things, that the Secretary of the Interior shall determine the charges to be made upon the irrigable lands under any irrigation project and the manner in which such charges shall be paid; and further, that "The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably".

It is apparent that the Congress intended that the reclamation fund should be a *revolving* fund, that the cost of each irrigation project should be assessed against the property benefited thereby, and that the assessments should be paid back into the fund for use in subsequent projects without diminution. *Swigart* v. *Baker*, 229 U. S. 187.

This plan is further effectuated by Sections numbered 3 of the 1911 and 1920 Acts, which provide that the money derived from the sale of the lands shall be covered into the reclamation fund and be placed to the credit of the project for which the lands were acquired or withdrawn. Since, as above pointed out, the cost of the one tract in question and the improvements made upon the other tracts was paid from the reclamation fund, such expenditures must be regarded as a part of the cost of the irrigation project and must be repaid by the landowners benefited by the project.

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If the lands in question were to be sold under the 1935 Act, the money derived from the sale would be covered into the general fund of the Treasury. This, of course, would diminish the amount which otherwise would be available for reclamation purposes, the result being interference with and retardation of the reclamation program. I do not think that such a result was intended by the 1935 Act, or that the provisions of that Act require such a construction. Indeed, under the circumstances, it may be strongly argued that the landowners obligated to repay the cost of the Lower Yellowstone Project have a vested right to have the money derived from the sale of the lands credited against the cost of this project.

I think it particularly true that the 1935 Act does not apply to the three tracts of public land withdrawn from entry. It will be noted that the Act in terms applies only to property "acquired" by a Federal agency. Lands forming a part of the public domain belong to the Government at large, and a withdrawal of such land for the use of a particular agency cannot properly be regarded as an "acquisition" of the land by that agency. This distinction, as above suggested, is observed in the 1911 and 1920 Acts, the former applying only to "acquired" lands and the latter to "withdrawn" lands.

For the reasons stated, I concur in the opinion of your Solicitor that the Acts of February 2, 1911, and May 20, 1920, are not repealed by the Act of August 27, 1935, and that you have authority to sell and convey the four tracts of land in question in accordance with the provisions of the two earlier Acts.

Respectfully,

HOMER CUMMINGS.

To the Secretary of the Interior.

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LEGALITY OF AWARD OF CONTRACTS FOR RADIO TRANSMITTING EQUIPMENT

A bid on a Government contract specifying an article materially different from the articles specified in the invitation for bids is properly rejected, notwithstanding the fact that the bid is accompanied by a statement to the effect that in the opinion of the bidder the article offered is in strict compliance with the Government specifications and that any deviation therefrom should be regarded as an error in the bidder's specifications and not as an exception to the Government specifications.

Where funds are available for the purchase of certain articles and a valid contract therefor has been made by the Government, a decision or statement by the Comptroller General of the United States that appropriated funds are not available for payments under the contract may not be treated by the contractor as an anticipatory breach.

DEPARTMENT OF JUSTICE,
January 26, 1937.

SIR: Reference is made to your letter of December 31, 1936, requesting my opinion upon certain questions relating to a contract between the United States and the Graybar Electric Company, Inc., for radio transmitting equipment.

From your letter and the documents submitted in connection therewith the essential facts, as presented by you, may be stated as follows:

(a) Under date of September 26, 1935, your Department issued a circular proposal inviting bids for supplying radio transmitting equipment according to specification contained therein. In response to that invitation bids were submitted by RCA Manufacturing Company, Inc., Graybar Electric Company, Inc., and Radio Receptor Company, Inc., the bid of the last being lowest as to price.

(b) The specification mentioned in the circular proposal was written on broad lines to enable prospective bidders to offer equipment of their own design or development providing it met the specification. Paragraph 2, section V. MISCELLANEOUS of the specification required that "each bidder shall supply a complete description of the equipment which he proposes to furnish including schematic and outline drawings and detailed data on performance."

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(c) The bids received in response to the proposal were examined and evaluated by the engineering staff of the War Department which found that the respective drawings and data of the RCA Manufacturing Company and Graybar Electric Company described a product substantially meeting the requirements of the Government's specification, but that Radio Receptor Company's drawing and data showed a product materially failing to meet them in a number of important particulars. The Radio Receptor Company's bid, however, was accompanied by a note reading as follows:

"The attached specifications cover equipment which in the opinion of this organization is strictly in compliance with Signal Corps Specifications SC–171–97 as modified by Signal Corps Proposal NY–36–46. Any deviation from these specifications stipulated in the attached specifications of this organization should be considered an error in the attached specifications and not an exception to Signal Corps Specifications 171–97."

(d) The Secretary of War determined that the Radio Receptor Company's bid was not responsive to the invitation, accordingly rejected it, and awarded the contract to the Graybar Electric Company, the next lowest bidder.

(e) The Radio Receptor Company protested the rejection of its bid and the award of the contract to the Graybar Electric Company.

(f) In opinions dated February 17 and May 16, 1936, the Comptroller General advised the Secretary of War that appropriated moneys were not available for the payment under the contract to the Graybar Electric Company, his conclusions being based upon what he considered illegal action of the Secretary of War in rejecting the Radio Receptor Company's bid as not responsive to the proposal. In his letter of February 17, 1936, the Comptroller General, after quoting the note which accompanied Radio Receptor Company's bid (see paragraph (c) above), stated as his conclusion that "The legal effect of the notation on said bid is an offer to furnish the equipment in strict accordance with the Government specifications."

I also understand from your letter that there are appropriated funds available for the purchase of the equipment referred to.

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You request my opinion upon the following questions:

(1) Assuming the correctness of the administrative determination that the equipment described in the detailed drawings and data submitted by the Radio Receptor Company with its bid showed a product failing in material particulars to meet the requirements of the specifications referred to in the circular proposal by which bids were invited, was the rejection of the bid of the Radio Receptor Company lawful?

(2) Assuming the correctness of the administrative determination that the detailed drawings and data submitted by the Graybar Electric Company, the next lowest bidder, showed a product substantially meeting requirements of the specification referred to in the circular proposal, was the award of the contract lawfully made to that bidder, determined by the Secretary of War to be the lowest responsible bidder that could satisfactorily perform the work required to the best advantage of the Government?

(3) Does either the decision of the Comptroller General that appropriated funds are not available for payment under a contract duly let by the War Department for necessary supplies, or the contractor's consequent anticipated difficulty in securing payment for supplies delivered under such contract because of such a decision of the Comptroller General, in any way impair the binding force of the contract or the right of the War Department to demand performance by the contractor?

The applicable statutes require that purchases and contracts for supplies and equipment of the War Department shall be made by advertisement for proposals except when the public exigencies require otherwise. Revised Statutes 3709 (U. S. C., Title 41, Sec. 5); U. S. C., Title 10, Sec. 1201. These statutes were enacted for the benefit of the Government, and impose a duty upon the Department to accept the proposal most advantageous to the Government. *O'Brien* v. *Carney*, 6 F. Supp. 761. It has been held that this duty requires the Department to award the contract to the lowest responsible bidder. *O'Brien* v. *Carney*, *supra; Arensmeyer-Warnock-Zarndt* v. *Wray*, 194 N. Y. Supp. 398; 33 Op. 453.

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It is well established that the invitation for bids on a Government contract must be such as to permit full and free competition, and that it must define the product to be contracted for in terms sufficiently definite to assure that every bid made in compliance therewith will be for substantially the same product. *United States* v. *Pan-American Petroleum Co.*, 6 F. (2d) 43, 68 (affirmed, 9 F. (2d) 761, 273 U. S. 456); *United States* v. *Ellicott*, 223 U. S. 524; *Fones Hardware Co.* v. *Erb*, 54 Ark. 645; *Bolton* v. *Gilleran*, 105 Cal. 244; *Hannan* v. *Board of Education*, 25 Okla. 372; *Chippewa Bridge Co.* v. *Durand*, 122 Wis. 85. This is necessary to enable all bidders to compete on a common basis and the Government to secure the lowest price obtainable. *Tice* v. *Long Branch*, 98 N. J. Law 214; *Inge* v. *Mobile*, 135 Ala. 187; *Kneeland* v. *Furlong*, 20 Wis. 437.

The long standing practice of requiring bidders on Government contracts for products which are not standardized to submit designs and specifications of the articles offered has been approved by the courts. *Attorney General* v. *Detroit*, 26 Mich. 263; *Patterson* v. *City of Zanesville*, 42 Ohio App. 428; *Brener* v. *Philadelphia, et al.*, 305 Pa. 182; *Stoll* v. *Mayor and City of Baltimore*, 163 Md. 282. This is often the only means of securing real competition. Where several products, any one of which will perform the required service, are available, detailed specifications describing only one of them would, in many instances eliminate from the competition all bidders except the maker of that particular product. In such cases the most effective method of securing real competition is for the invitation to state the function to be performed by the product thus permitting a bidder to submit his own product, or a design thereof with specifications as to its construction, in order that the contracting agent of the Government may determine therefrom whether the product so offered will in fact perform the required service. It does not seem to be questioned that the principles above mentioned were fully complied with in the instant case.

It is also well established that if in response to an invitation for bids on a Government contract one is submitted which offers to furnish a product materially different from

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that described or specified in the invitation, it not only may, but must, be rejected. *Case* v. *Inhabitants of Trenton*, 76 N. J. Law 696; 13 Op. 510. Any other rule would defeat the purposes of the statute. *United States* v. *Ellicott*, *supra; Ricketson* v. *Milwaukee*, 105 Wis. 591. It follows that where in a proper case a design and specifications of the offered product are requested and submitted, and examination of those submitted by a particular bidder discloses that the product offered by him does not meet the specifications contained in the invitation, his bid should be rejected.

You state that in the instant case an examination of the design and specifications submitted by the Radio Receptor Company with its bid showed an offered product which failed in material respects to comply with the specification contained in the invitation. Accepting this as true, it is my opinion that your rejection of that company's bid was lawful, and that this was so notwithstanding the note recited in paragraph numbered (c) above accompanying the bid. To permit bidders on Government contracts to submit bids specifying articles which manifestly are not the articles described in the invitation, and then to render such bids legal by accompanying them with qualifying statements to the effect that in so far as the products offered fail to comply with the specifications in the invitation the bids are to be considered in error, would establish a practice which, in my opinion, would be both unlawful and vicious. Such a practice could only lead to confusion, delay, and unnecessary expense. Indeed, in the instant case had you let the contract to the Radio Receptor Corporation upon its bid as submitted it is not improbable that a dispute would have arisen between the Government and the contractor over the question whether a product, complying with the specifications set out in the bid and offered by the contractor in the performance of the contract, did or did not comply with the specifications in the invitation—the contractor contending that it did and the Government contending that it did not, with a probable lawsuit in the end to settle the question. As the courts have often pointed out, however, what the Government required was "honest work, not lawsuits". *Com-*

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monwealth v. *Mitchell*, 82 Pa. 343; *Hannan* v. *Board of Education*, *supra; Williams* v. *Topeka*, 85 Kan. 857.

The case of *United States* v. *Ellicott*, *supra*, aptly illustrates the probable results growing out of contracts attempted upon bids similar to that of the Radio Receptor Company and states the applicable law. In that case the Isthmian Canal Commission, by advertisement and specification, invited bids for the construction and delivery of six dump barges. Article 1 of the specification, under the heading "Framing", prescribed in detail the weight and dimensions of the structural material to be used in the construction of the barges. Ellicott submitted a bid with a drawing or sketch attached, which drawing or sketch showed details of structural material differing from that prescribed in the specifications. This fact was called to the attention of Ellicott who replied: "our drawing No. 2105 was not intended to show working details, but solely to limit the conditions of displacement, load, and draft. As long as these are maintained we shall be pleased to follow such reasonable design of working details in arrangement and distribution of material as Mr. Maltby or his inspector may require." The contract was let to Ellicott on his bid, and two days later he submitted to the Government officers for their inspection the material which he proposed to use. These officers found that the structural material submitted did not meet the Government's specifications and refused to permit its use. Ellicott contended, however, that this material complied with the contract since it was in accord with drawing number 2105 attached to his bid and made a part of the contract. The Government refused to accept the barges and Ellicott sued for damages for breach of contract. The court held the contract void for uncertainty, saying in the course of its opinion (pp. 542–543):

"* * * viewing the contract as a whole and determining that the specifications so far as the 'Framing' schedule is concerned should have been treated as unaffected by the provisions of article 1, it is evident that there was a conflict so irreconcilable between essential provisions of the assumed contract as to render it impossible to enforce it as an agreement between the parties. This result of the ab-

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solutely antagonistic and destructive character of essential provisions of the contract, one upon the other, can only be escaped by indulging in one of two hypotheses, either that the terms of the advertisement and specifications as incorporated in the assumed contract overshadowed and virtually destroyed the proposals resulting from the bid of the claimant, which also was incorporated in the contract, or conversely that the proposals which the bid embraced had the effect of setting at naught the provisions of the specifications. But if the first assumption were indulged in, it would clearly result that there was no right to recover, since that right is based upon the theory that the specifications are not binding and need not be complied with; and if the second were indulged, the same result would follow, since it would then come to pass that the contract was *so irresponsive to and destructive of the advertised proposals as to nullify them, and therefore cause it to result that the contract was one made without the competitive bidding which was necessary to give it validity.*" [Italics supplied.]

It is true that in the *Ellicott* case both the advertised specifications and the submitted specifications were, by reference, incorporated in the contract. However, I am unable to see any distinction between that case and the present in the application of the principle under discussion.

Moreover, as stated above, the contracting officer is required to let the contract to the lowest *responsible* bidder. One of the essential tests of responsibility, especially in connection with a bid on a product as technical as radio transmitting equipment, is that the bidder be able to know that the product which he offers does in fact meet the advertised specifications. Responsibility in the sense in which it is here used means more than ability to respond in damages for failure to comply with the contract. 28 Op. 384, 388; *O'Brien* v. *Carney*, *supra; Williams* v. *Topeka*, *supra.*

From the facts given it appears that with the Radio Receptor Company's bid eliminated and disregarded the bid of the Graybar Electric Company was the lowest bid submitted. It also appears that you found the Graybar

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Electric Company to be a responsible bidder and that its bid offered a product substantially meeting the requirements of the specifications contained in the invitation. It is my opinion, therefore, that the Graybar Electric Company's bid was the lowest *legal* bid, and that the award of the contract to it was a legal award.

It is my further opinion, upon the facts given, that the Comptroller General's statement that appropriated funds are not available for payment under the contract in no way affects its validity or your right to require the contractor to comply therewith. Apparently the Comptroller General's statement is not based upon the fact that no appropriation is available for the purchase of the equipment contracted for, but rests solely upon his view that the contract in question was not legally awarded. His statement, therefore, is without basis in law. *Miguel* v. *McCarl*, 291 U. S. 442, 454. Under the statute it was your duty, in the exercise of your discretion, to make the necessary administrative determinations; and having made them your findings are controlling. *Silberschein* v. *United States*, 285 Fed. 397, 401, and authorities there collected. Regardless of the Comptroller General's views, the validity of the contract depends upon the facts involved; and I know of no principle of law which would authorize the contractor to treat the statement of the Comptroller General as an anticipatory breach of the contract. It must be presumed that the Government will on its part faithfully perform the conditions of its valid contract until such time as it has failed to so perform. The Comptroller General's statement cannot affect this presumption.

It follows from the above that my answers to your questions 1 and 2 are in the affirmative, and my answer to your question 3 is in the negative.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

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POLITICAL CHARACTER OF IRRIGATION DISTRICTS IN RELATION TO REVENUE ACTS—RECONSIDERATION OF PRIOR OPINION

The answer to the question whether a particular irrigation district is a "political subdivision" within the meaning of Section 620 (3) of Title IV of the Revenue Act of 1932, as amended, cannot be predicated upon decisions of state courts interpreting the meaning of that term as used in state constitutions or statutes, but must be controlled by the intention of the Congress as expressed in the Act itself.

The opinion of the Attorney General to the Secretary of the Treasury of January 20, 1914 (30 Ops. 252), holding that special assessment districts lawfully created for public purposes under the authority of the several states and authorized to exercise a portion of their respective sovereign powers are state political subdivisions within the meaning of the Revenue Act of 1913, should not be disturbed.

DEPARTMENT OF JUSTICE,
February 4, 1937.

SIR: I have your letter of December 5, 1936, in which you request reconsideration of the opinion of the Attorney General to the Secretary of the Treasury, dated January 30, 1914 (30 Op. 252). That opinion holds that special assessment districts, lawfully created for public purposes under the authority of the several states and authorized to exercise a portion of their respective sovereign powers, are state "political subdivisions" within the meaning of the Revenue Act of 1913.

It appears from your letter that there is now pending in the Bureau of Internal Revenue the question whether the sale of gasoline by a producer to an irrigation district in the state of California is subject to the excise tax imposed by Section 617 (a), Title IV, of the Revenue Act of 1932, as amended; and that the answer apparently turns upon whether the irrigation district is a "political subdivision" of the state within the meaning of Section 620 (3), Title IV, of the Revenue Act of 1932, as amended (49 Stat. 1025; U. S. C., Title 26, c. 20), which provides:

"Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—

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(3) for the exclusive use of the United States, any State, Territory of the United States, or any *political subdivision* of the foregoing, or the District of Columbia." [Italics supplied.]

The opinion which you request me to reconsider was rendered in the interpretation of Paragraph B of Section II of the Revenue Act of 1913 (38 Stat. 114, 168), the pertinent provisions of which are as follows:

"That in computing net income * * * there shall be excluded the interest upon the obligations of a State or any political subdivision thereof. * * *."

It is to be noted that the term "political subdivision" seems to be used in the quoted sections of the revenue acts of 1932 and 1913 in the same general sense.

It appears that the Treasury Department has followed the Attorney General's opinion in the administration of the income tax laws since 1914, but you state that since it was rendered the supreme and appellate courts of certain western states, including California (*Wood* v. *Imperial Irrigation District*, 17 Pac. (2d) 128), have held assessment districts such as irrigation and reclamation districts not to be "political subdivisions" within the meaning of certain state statutes and constitutional provisions. Your request is that the opinion of January 30, 1914, be reconsidered in the light of those subsequent decisions.

It must be observed at the outset that instrumentalities of a state legally employed as a means of executing its sovereign powers are immune from Federal taxation under the constitutional principle recognized since the decision of the United States Supreme Court in *McCulloch* v. *Maryland*, 4 Wheat. 316. It may be questioned, therefore, whether an assessment district such as the irrigation district to which you refer is not a state instrumentality which, without regard to statutory exemption, would be exempt from the tax. However, I do not deem it necessary to consider this question—a determination of which would not be controlling here, since the Congress has the power and may have intended to exempt agencies of the states other than those which would fall within the protection of the constitutional principle The inquiry which you present is

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whether the particular irrigation district indicated is a "political subdivision" within the meaning of Section 620 (3), Title IV, of the Revenue Act of 1932, as amended. The answer cannot be predicated upon decisions of state courts interpreting the meaning of the term as used in state constitutions or statutes, but must be controlled by the intention of the Congress as expressed in the act itself (*Burnet* v. *Harmel*, 287 U. S. 103, 110).

The term "political subdivision" may be used in statutes in more than one sense. It may designate a true governmental subdivision such as a county, township, etc., or, as held in the Attorney General's opinion under consideration, it may have a broader meaning, denoting any subdivision of the state created for a public purpose although authorized to exercise a portion of the sovereign power of the state only to a limited degree.

In *Goshen Irrigation District* v. *Hunt*, 57 Pac. (2d) 793, the Supreme Court of Wyoming, in determining whether an irrigation district was a legal subdivision of the state within the meaning of the Wyoming Revised Statutes exempting from state tax motor vehicles owned by "the United States, state of Wyoming, or any county, city, town, or other legal subdivision of the state", said:

"* * * So far as mere verbiage goes, it may be conceded that in the sense of having fixed boundaries within this state and having been created by law for the exercise of certain powers, the relator is a legal subdivision. But the real question is whether it was the intention of the Legislature in employing the language it did in said section to exempt said relator and other irrigation districts in this state from the payment of the fees described in the article of which the section aforesaid is a part. That intention must be ascertained by an examination of the law in the light of the fixed rules of judicial interpretation of statutes, of its subject-matter as an entirety and the peculiar nature of relator as a corporate entity established by law. It is obvious, also, that the same word or phrase may have different meanings as it is controlled by the connection in which it is employed, the evident purpose of the statute where it is used or the subject-matter to which it relates.

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"There is also pertinent here the maxim frequently employed in statutory construction known as 'ejusdem generis', which is to the effect that where general words are added to an enumeration or designation of particular subjects or classes, the general words do not explain or amplify those preceding them, but are themselves limited and explained by the terms used in the antecedent list. 57 C. J. 981, and cases cited; 25 R. C. L. 996, sec. 240."

In Section 620 (3) the term "political subdivision" does not follow the words "county, city, town, etc.", but the words "United States, any State, Territory of the United States." As thus employed the term does not require the restricted interpretation placed upon it in the *Goshen* case. To attribute at this time to the term "political subdivision", as used in the Revenue Act of 1913 and in Section 620 (3), a meaning different from that stated in the former opinion of the Attorney General would disturb the above-mentioned practice in the administration of the income tax law followed for over twenty-two years. The reasonable view is that the Congress, which must be presumed to have had knowledge of this administrative practice under the former act, intended that the term as used in Section 620 (3) should receive a similar construction.

I do not feel, therefore, that the Attorney General's former opinion should be disturbed upon the authority of the state decisions to which you refer, and I suggest that any change in policy should be made only in accordance with legislative direction or judicial decision.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

APPOINTMENT OF THE COMMISSIONER OF IMMIGRATION AND NATURALIZATION

The Commissioner of Immigration and Naturalization is an officer of the United States, and since the method of his appointment is not prescribed by statute, he may be appointed by the President with the advice and consent of the Senate.

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DEPARTMENT OF JUSTICE,
February 8, 1937.

MADAM: Reference is made to your letter of February 2, 1937, in which you request my opinion on the following question:

"Can the position of Commissioner of Immigration and Naturalization as provided by section 14 of the Executive Order No. 6166 of June 10, 1933, be effectively filled by an appointment of the Secretary of Labor, or must the position be filled by the appointment of the President with the advice and consent of the Senate?"

Executive Order No. 6166 of June 10, 1933, was issued under authority of Title IV of the Act of June 30, 1932, 47 Stat. 413, as amended by Section 16 of the Act of March 3, 1933, 47 Stat. 1517, which provides in part as follows:

"SEC. 401. The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.

"Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

* * * * *

"(c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

"(d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;

"(e) To eliminate overlapping and duplication of effort; and * * *."

"SEC. 402. When used in this title, the term 'executive agency' means any * * * board, bureau, division, service, or office in the executive branch of the Government * * *."

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"SEC. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

* * * * *

"(b) Consolidate the functions vested in any executive agency; * * *

"(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

"(d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers and duties of its executive head; * * *." [47 Stat. 1517.]

"SEC. 405. (c) All laws relating to any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, shall, in so far as such laws are not inapplicable, remain in full force and effect, and shall be administered by the head of the executive agency to which the transfer is made or with which the consolidation is effected." [47 Stat. 1518.]

Section 14 of Executive Order No. 6166 reads as follows:

"The Bureaus of Immigration and of Naturalization of the Department of Labor are consolidated as an Immigration and Naturalization Service of the Department of Labor, at the head of which shall be a Commissioner of Immigration and Naturalization."

Section 19 of said Executive Order provides in part:

"Each agency, all the functions of which are transferred to or consolidated with another agency, is abolished."

The Bureau of Immigration, with a Commissioner General of Immigration, an officer in the Department of Labor, at the head thereof, was established and the functions of the Bureau and the duties of the Commissioner General were prescribed by statute. (U. S. C., Title 8, Secs. 101–118.) The same is true with respect to the Bureau of Naturalization and the Office of Commissioner of Naturalization. (U. S. C., Title 8, Secs. 351–356.) In general, the

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duties of these two officers were, respectively, to administer, under the supervision of the Secretary of Labor, the immigration laws and the naturalization laws of the United States. The statute provided specifically for the appointment of the Commissioner of Immigration by the President with the advice and consent of the Senate, and for that of the Commissioner of Naturalization by the Secretary of Labor. Both were, therefore, officers of the United States. *United States* v. *Perkins*, 116 U. S. 483; *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Moore*, 95 U. S. 760; *United States* v. *Hartwell*, 6 Wall. 385.

The effect of Section 14 of Executive Order No. 6166 was to consolidate the two bureaus above mentioned and their functions into a bureau to be known as the Immigration and Naturalization Service of the United States having as its executive head a Commissioner of Immigration and Naturalization vested with all the powers and charged with all the duties theretofore exercised by both the Commissioner General of Immigration and the Commissioner of Naturalization. The Immigration and Naturalization Service of the United States therefore is a new bureau—being neither the Bureau of Immigration nor the Bureau of Naturalization, but a consolidation of the two. Likewise the position of Commissioner of Immigration and Naturalization is a new position, being a combination of the position of the Commissioner General of Immigration and that of the Commissioner of Naturalization.

The question is, therefore, whether the Commissioner of Immigration and Naturalization is an officer of the United States who must be appointed by the President with the advice and consent of the Senate, or whether he is an employee of the Department of Labor who may be appointed by the Secretary of Labor under Section 169 of the Revised Statutes. The statute makes no provision for his appointment, and therefore if he is an officer of the United States, authority to appoint is in the President with the advice and consent of the Senate. Constitution, Art. II, Sec. 2, Cl. 2; 6 Op. 1; 15 Op. 449; 17 Op. 532.

The question you present is similar to one which arose under the provisions of Section 2 of the Act of March 3,

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1875, 18 Stat. 371, 396. The pertinent parts of that Act read as follows:

"SEC. 2. That on and after July first, eighteen hundred and seventy-five, the organization of the Treasury Department, and the several offices thereof, and the annual salaries paid to the persons therein, shall be as follows, to wit:

* * * * *

"In the Office of the First Comptroller:—

"The First Comptroller of the Treasury, five thousand dollars; deputy comptroller, two thousand eight hundred dollars; four chiefs of division, at two thousand four hundred dollars each; six clerks of class four; etc.

* * * * *

"In the Office of the Commissioner of Customs:—

"The Commissioner of Customs, four thousand five hundred dollars; deputy commissioner, two thousand five hundred dollars; two chiefs of division, at two thousand four hundred dollars each; two clerks of class four; etc.

* * * * *

"In the Office of the First Auditor:—

"The First Auditor of the Treasury, four thousand dollars; deputy auditor, two thousand five hundred dollars; four chiefs of division, at two thousand one hundred dollars each; two clerks of class four; etc.

* * * * *

"In the Office of the Register:

"The Register of the Treasury, four thousand five hundred dollars; one assistant register and one deputy register, at two thousand five hundred dollars each; seven clerks of class four; etc.

* * * * *

"That the duties heretofore prescribed by law and performed by the chief clerks in the several Bureaus named shall hereafter devolve upon, and be performed by, the several deputy comptrollers, deputy auditors, deputy register, and deputy commissioner herein named: * * *."

The Secretary of the Treasury inquired of the Attorney General whether the officers deputy comptroller, deputy commissioner of customs, deputy auditor, and deputy regis-

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ter, designated by the Act, should be appointed by the President with the advice and consent of the Senate, or whether their appointment might be made by the Secretary of the Treasury, and, in an opinion dated June 25, 1875 (15 Op. 3, 4) the Attorney General held:

"In each of the bureaus enumerated above there is at present an officer styled 'chief clerk.' This officer being omitted in the organization thereof as established by the act of 1875, a preliminary inquiry here suggests itself, to wit, whether the deputy introduced into such organization, upon whom the duties of the chief clerk are devolved, is to be regarded as merely a change in the title of an existing office or as the creation of a new office. The result at which I arrive on this point is that the act creates in each of the bureaus referred to a new office, under the designation of 'deputy comptroller,' &c., and tacitly abolishes the existing office of chief clerk therein. That this view coincides with the understanding of Congress upon the same subject may reasonably be inferred from the fact that express provision is made for devolving the duties of the latter upon the former, which would seem to be quite unnecessary if nothing more than a change of name were intended. Regarding, then, the various deputies established by the act of 1875 as new offices, I proceed to the consideration of the question submitted.

"The Constitution (article 2, section 2,) gives the President power to appoint all officers of the United States whose appointments are not therein otherwise provided for, and which shall be established by law, but authorizes the Congress to vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. And the general rule deducible from this provision is, that, unless it is otherwise ordained in the Constitution itself or by positive legislative enactment, the appointment to any office of the United States created by Congress must be made by the President, with the advice and consent of the Senate. Hence this mode of filling the new offices mentioned above should be employed, if the head of the Treasury Department (and it is deemed unnecessary here to inquire further) is not vested by statute with authority to make the appointments thereto.

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"No provision on the subject of appointment to those offices is made by the act of 1875. But by section 169 of the Revised Statutes 'each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employes, and at such rates of compensation respectively as may be appropriated for by Congress from year to year.' Unless this section confers authority to make the appointments upon the head of the Treasury Department, I am not aware of any statutory provision that does; and its sufficiency in that respect depends upon whether the deputy comptrollers, deputy auditors, &c., are included within the meaning of the clause thereof which reads, 'clerks of the several classes recognized by law.' For I assume that those officers do not come within the terms of description immediately following in the same section, viz: 'messengers, assistant messengers, copyists, watchmen, laborers, and other employes;' the word employe, which is, perhaps, the more general of these terms, being taken in a restricted sense, in accordance with a familiar rule of interpretation—*noscitur a sociis.* That clause was unquestionably intended to have a very comprehensive scope, and to embrace a variety of subordinate officers in the different Departments besides those designated as clerks of the first, second, third, and fourth classes; such, for example, as those enumerated in section 201 as belonging to the Department of State, and in section 351 as belonging to the Department of Justice. It includes, in my opinion, the officers described in the act of 1875 as 'heads of divisions;' a description applicable to a class of clerks then recognized by law in the organization of the Treasurer's Office and of the Internal Revenue Bureau, and also to a class then actually existing, though without any statutory recognition, in other bureaus of the Treasury Department. But it clearly was not designed to include the deputy commissioners of internal revenue nor the deputy comptroller of the currency, since the appointment of these officers is especially provided for in other sections of the Revised Statutes (see sections 235, 322, 327). And the newly-created deputies

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in the bureaus of the Comptroller, Auditor, Register, &c., being officers of like grade with those just mentioned, as is indicated by their title, I think the clause in question cannot well be deemed to have any application to them.

"My conclusion is that section 169 of the Revised Statutes does not invest the head of the Treasury Department with authority to appoint the new deputy bureau officers; and there being no other statutory provision, within my knowledge, which imparts to him this authority, it seems to me that under the Constitution their appointment can only be made by the President, with the advice and consent of the Senate; though in the recess of the Senate the President may, of course, fill them by temporary commissions."

A similar question also arose under the Act of May 22, 1908, 35 Stat. 203. That Act was an appropriation act and contained the following language: "For Comptroller of the Currency, five thousand dollars; Deputy Comptroller, three thousand five hundred dollars; Deputy Comptroller, three thousand dollars." The item of $3,000 for a deputy comptroller was a new provision in the law, no such deputy comptroller having theretofore been provided for. The Secretary of the Treasury inquired of the Attorney General whether such "Second Deputy Comptroller" could be appointed by the Secretary of the Treasury under Section 169 of the Revised Statutes, or whether his appointment must be made by the President with the advice and consent of the Senate. The Attorney General held (26 Op. 627, 628):

"Section 169, Revised Statutes, simply authorizes the head of a Department to employ 'such number of clerks' and other subordinate employees 'as may be appropriated for by Congress from year to year.' I do not think that this provision authorizes you to appoint the Deputy Comptroller in this case, who is not a clerk and is manifestly an officer of the United States.

"'The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath and perhaps to give an official bond.' (*Throop* v. *Langdon*, 40 Mich., 683, cited in *Baltimore City* v. *Lyman*, 92 Md., 591.)"

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The opinion of the Attorney General to the Secretary of Commerce and Labor, dated June 1, 1911 (29 Op. 116), relating to the appointment of the Deputy Commissioner of Fisheries, is also in point. The office of Deputy Commissioner of Fisheries was created by an item in the sundry civil appropriation act of 1903 (32 Stat. 1102). The Act did not specify how or by whom appointment to the office should be made, and the office was filled by appointment of the Secretary of Commerce and Labor. In the opinion referred to, rendered in response to an inquiry of the Secretary of Commerce and Labor relative to such appointment, the Attorney General said:

"The Constitution provides (Art. II, sec. 2) that all officers of the United States shall be appointed by the President by and with the advice and consent of the Senate, except where, in case of inferior officers, Congress shall otherwise provide by law. The general rule deducible from this provision is that, in the absence of an express enactment to the contrary, the appointment of any officer of the United States belongs to the President by and with the advice and consent of the Senate. (6 Op. 1; 15 ib. 3, 449; 17 ib. 532; 18 ib. 98, 298; 26 ib. 627.)

"There being no specific statutory authority given you to appoint the Deputy Commissioner of Fisheries, it is clear that you do not possess such authority unless the position comes within the scope of section 169 of the Revised Statutes, which provides that 'each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employés, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year.'

"It was held by Attorney General Pierrepont, in 15 Op. 3, that a Deputy Comptroller of the Treasury, a deputy commissioner of customs, a Deputy Auditor of the Treasury, and a Deputy Register of the Treasury did not come within the scope of section 169 of the Revised Statutes so as thereby to vest their appointment in the head of the

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Treasury Department. There being no express statutory provision for the appointment of such officers, it was held that they could only be appointed by the President by and with the advice and consent of the Senate.

"Likewise, in 26 Op. 627, Attorney General Bonaparte held that a Second Deputy Comptroller of the Treasury was not a clerk within the meaning of section 169 of the Revised Statutes, and must be appointed by the President by and with the advice and consent of the Senate, there being no express statutory provision for the appointment of such officer.

"The office of Deputy Commissioner of Fisheries is of like grade to those offices just mentioned. While his duties are not prescribed by statute, the title of the office necessarily implies a power to perform all the duties which might be performed by the Commissioner of Fisheries, the nature of whose office is defined by sections 4395 and 4396 of the Revised Statutes, and whose appointment is vested in the President by and with the advice and consent of the Senate.

* * * * *

"Following with approval the ruling in the cases cited, I beg to advise you that the present incumbent of the office of Deputy Commissioner of Fisheries is not legally appointed, his present status being a de facto officer. The appointment must be made by the President by and with the advice and consent of the Senate. * * *"

In *Burnap* v. *United States*, 252 U. S. 512, 515, the Supreme Court said:

"Section 169 of the Revised Statutes provides that:

"'Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employés, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year.'

"* * * The term employ is used as the equivalent of appoint. 21 Ops. Atty. Gen. 355, 356. The term clerks and other employees, as there used, is sufficiently broad to in-

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clude persons filling positions which require technical skill, learning and professional training. 29 Ops. Atty. Gen. 116, 123; 21 Ops. Atty. Gen. 363, 364; 20 Ops. Atty. Gen. 728. *The distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto.* 15 Ops. Atty. Gen. 3; 17 Ops. Atty. Gen. 532; 26 Ops. Atty. Gen. 627; 29 Ops. Atty. Gen. 116; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Moore*, 95 U. S. 760, 762; *United States* v. *Perkins*, 116 U. S. 483; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Hendee*, 124 U. S. 309; *United States* v. *Smith*, 124 U. S. 525; *Auffmordt* v. *Hedden*, 137 U. S. 310; *United States* v. *Schlierholz*, 137 Fed. Rep. 616; *Martin* v. *United States*, 168 Fed. Rep. 198." [Italics supplied.]

In the administration of the immigration and naturalization laws the Commissioner of Immigration and Naturalization takes the place of the Commissioner General of Immigration and the Commissioner of Naturalization—both officers of the United States. His duties comprise the combined duties of both of those officers. There is nothing in Executive Order No. 6166 or in the statute under which it was issued to indicate that his office should be considered of less dignity than that of the Commissioner General of Immigration or that of the Commissioner of Naturalization, whose combined duties he is now required to perform.

It seems clear, therefore, that the Commissioner of Immigration and Naturalization is an officer of the United States; and, since the method of his appointment is not prescribed by statute, it is my opinion that he may be appointed only by the President with the advice and consent of the Senate.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF LABOR.

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APPLICABILITY OF ACT OF JUNE 20, 1936, TO MEMBERS OF OSAGE TRIBE OF INDIANS IN OKLAHOMA

The Act of June 20, 1936, providing certain forms of relief for restricted Indians whose lands have been taxed or lost by nonpayment of taxes, is applicable to members of the Osage Tribe of Indians in Oklahoma in the same manner and to the same extent that it is applicable to members of other Indian Tribes.

DEPARTMENT OF JUSTICE,
February 13, 1937.

SIR: Reference is made to your letter of January 4, 1937, in which you request my opinion as to whether the Act of June 20, 1936, c. 622, 49 Stat. 1542, is applicable to individual members of the Osage Tribe of Indians in Oklahoma.

That Act, entitled "An Act to relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes," reads as follows:

"That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

"SEC. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government, and shall be nontaxable until otherwise directed by Congress."

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Section 1 of the Act authorizes the use of Federal funds for payment of taxes on certain classes of Indian lands and for redemption or reacquisition of such lands sold for non-payment of taxes. Section 2 exempts from taxation lands held by an Indian subject to restriction against alienation or encumbrance and purchased out of trust or restricted funds. It thus appears that the statute deals with certain classes of Indian *lands* without restriction as to the classes of *Indians* to which it shall apply, and no particular tribe of Indians is mentioned. Hence, members of the Osage tribe of Indians in Oklahoma are entitled to the relief afforded by the Act to the same extent as the members of any other tribe of Indians unless they are excluded therefrom by other legislation.

It is my understanding that the Act of June 20, 1936, is the only legislation enacted by the Congress dealing with the use of Federal funds for the purposes specified in Section 1 of that Act. It follows, therefore, that the provisions of that Section are applicable to members of the Osage tribe as well as to members of other Indian tribes.

However, in determining whether the provisions of Section 2 of the Act are applicable to the Osage Indians, it is necessary to examine certain prior legislation having to do with the taxability of lands belonging to members of the Osage tribe.

Section 1 of the Act of March 2, 1929, c. 493, 45 Stat. 1478, provides in part:

"Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more of Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1959: *Provided*, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres." [45 Stat. 1479.]

It is obvious that the land exempted from taxation by the main clause of this enactment is limited to homestead allotments. Considering the language of the provision as a whole, it seems clear that the purpose of the main clause

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is to exempt from taxation homestead allotments generally, and that the purpose of the proviso is merely to limit the amount of such homestead land that the individual Indian may hold exempt from taxation. The restriction of the proviso is made to apply only to allottees, etc., mentioned in the main provision, and there would seem to be no reason why the land referred to in the proviso should not likewise be limited to homestead allotments.

Since, therefore, the 1929 statute is concerned with homestead allotments and that of 1936 with lands purchased with restricted or trust funds and restricted as to alienation or encumbrance, the earlier statute is not affected by the later, and they may operate in entire harmony.

The other legislation to be considered is the Act of February 27, 1925, c. 359, 43 Stat. 1008. Section 1 of that Act, among other things, authorizes the purchase of "real estate" and various other kinds of property with restricted or trust funds of members of the Osage tribe of Indians in Oklahoma. Section 3 provides in part:

"Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment *except taxes*, or be subject to alienation, without the approval of the Secretary of the Interior." [Italics supplied.]

It is evident from an examination of the whole statute that the property comprehended in the language "Property of Osage Indians * * * purchased as hereinbefore set forth * * *" is that purchased pursuant to the above-mentioned provision of Section 1, which expressly includes real estate. The provision that the designated property shall not be subject to the lien of any debt, claim, or judgment *except taxes* implies that such property shall be subject to taxation. By the terms of the statute, therefore, the lands of Osages not having certificates of competency purchased out of restricted or trust funds are taxable. The question thus arises whether this statutory provision is affected by Section 2 of the Act of June 20, 1936, hereinbefore set out.

The language of the 1936 Act is clear and unambiguous. It declares that "All lands the title to which is now held by

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an Indian subject to restrictions * * * heretofore purchased out of trust or restricted funds of *said Indian* * * * shall be nontaxable * * *." [Italics supplied.] The obvious purpose of the Act is to make nontaxable, lands of *all* Indians purchased out of trust or restricted funds and restricted as to alienation or encumbrance. The statute is clearly a relief measure, and there is no apparent reason why the Congress should desire to exclude any particular tribe of Indians from the relief afforded. The earlier Act does not make, and does not purport to make, the lands in question taxable. It merely exempts the lands from certain liens and makes it clear that the exemption does not extend to the lien of taxes, to which the lands are ordinarily, and were at that time, subject. There is no conflict between the two statutes. The former exempts a certain class of lands from certain liens not including tax liens, and the latter renders such lands non-taxable.

For the reasons stated, it is my opinion that the Act of June 20, 1936, is applicable to members of the Osage Tribe of Indians in Oklahoma in the same manner and to the same extent that it is applicable to members of other Indian tribes.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the SECRETARY OF THE INTERIOR.

STATUS UNDER ACT APRIL 13, 1934, OF NATIONS MAKING "TOKEN PAYMENTS" ON OBLIGATIONS TO UNITED STATES[1]

It was a necessary effect of the Act of April 13, 1934 (c. 112, 48 Stat. 574), as interpreted in the opinion of May 5, 1934, to exclude as a "default" such partial failure theretofore occurring as resulted from the making and acceptance of so-called "token payments", and if a Government which made such a payment should pay the full amount of the next installment due on its indebtedness to the United States, it would not be "in default", within the meaning of the term as used in that Act.

The Act of April 13, 1934, being penal, should not be unduly extended by construction.

[1] The publication of this opinion was temporarily withheld.

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DEPARTMENT OF JUSTICE,
May 18, 1934.

SIR: I have the honor to comply with your request of May 16 for my opinion upon the following question, stated by you to have arisen under the Act of April 13, 1934, forbidding financial transactions with foreign governments in default on their obligations to the United States.

"If a Government that has made a so-called 'token' payment on its obligations to the United States, and is now in the non-defaulting category under the Attorney General's ruling of May 5, should pay the full amount of the next installment, would it still be regarded as not in default?"

The operation of the statute, as applied to a particular country, is dependent upon a failure on the part of such country to meet its obligations to the United States. A government which made the so-called token payments had not met its obligations in full; but it was a necessary effect of the statute, as interpreted in my opinion of May 5, to exclude as a "default" such partial failure theretofore occurring as resulted from the making and acceptance of token payments under the circumstances indicated.

There was no waiver of the amounts overdue, and I feel confident that both the President and Congress contemplated their payment within a reasonable time. However, as no definite time was specified, it could not be said that the mere maturing of a subsequent installment which was paid when due would in itself automatically create a default. The statute, being penal, should not be unduly extended by construction.

It follows from these considerations that if a government which made a token payment under the circumstances stated in my opinion of May 5 should pay the full amount of the installment next due on its indebtedness, it would not be in default, within the meaning of that term as used in the Act of April 13, 1934.

Respectfully,

HOMER CUMMINGS.

To The SECRETARY OF STATE.

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DUTY TO PROVIDE COPIES OF PUBLICATIONS TO LIBRARY OF CONGRESS. *See* BOOKS FOR THE BLIND, 1, 2.

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ANIMAL INDUSTRY BUREAU.

JUNIOR VETERINARIAN, CHICAGO, ILL., COMPETITIVE STATUS. *See* MILITARY PREFERENCE, 1, 2.

ANTITRUST LAWS.

GOVERNMENT CONTRACTS FOR SUPPLIES. *See* CONTRACTS, 1.

APPOINTMENTS.

COMMISSIONER OF IMMIGRATION AND NATURALIZATION. *See* IMMIGRATION AND NATURALIZATION COMMISSIONER.

APPROPRIATIONS.

PUBLICATION OF FEDERAL REGISTER. *See* FEDERAL REGISTER ACT, 1, 2.

RECORDER OF DEEDS, DISTRICT OF COLUMBIA TO SUBMIT ESTIMATES FOR APPROPRIATIONS TO COMMISSIONER OF DISTRICT OF COLUMBIA. *See* DISTRICT OF COLUMBIA, 3.

SETTLEMENT OF INDEBTEDNESS AGAINST PERSHING HALL, PARIS, FRANCE. *See* PERSHING HALL.

VIRGIN ISLANDS, TRAVELING EXPENSES OF EMPLOYEES. *See* VIRGIN ISLANDS, 1.

ARCHIVIST OF UNITED STATES.

EXPENDITURES FOR MAINTENANCE OF ARCHIVES BUILDING. *See* NATIONAL ARCHIVES, 5, 6.

ARMY.

1. **Enlisted men.—Payment of burial expenses of enlisted men who die while absent without authority.**—A soldier temporarily absent without authority, particularly in the absence of facts showing that he is a deserter, is properly considered as "in active service" or "on the active list" within the meaning of the Act of March 9, 1928 (45 Stat. 251), authorizing appropriations for burial expenses of enlisted men who die in active service, etc. 239.
2. **Same.**—The term "on active duty" distinguished from the terms "in active service" and "on the active list." 239.
3. **Jurisdiction in connection with the adjudication of claims for lost property arising under the act of March 4, 1921, 41 Stat. 1437.—The Comptroller General is without authority to review the findings of fact made by the Secretary of War in the adjudication of claims arising under the act of March 4 1921,** 41 Stat. 1437, providing that the personnel of the Army shall be entitled to replacement or compensation in damages for personal property lost or damaged under certain circumstances. However, **the conclusion of the Secretary of War as to whether a particular claim under the facts found comes within the act, is not binding on the Comptroller General,** and the latter may review such claims to determine whether payment thereof is authorized by the statute, his determination being subject to review by the Court of Claims and, in a proper case, by the Attorney General. 181.

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ARMY—Continued.

4. **Same.**—The question whether the Secretary of War would be legally justified in ordering the disbursing officer of the Army to make payment of a claim approved by the Secretary of War but previously disallowed by the Comptroller General, involves a matter of policy as to which it would not be proper for the Attorney General to advise the Secretary of War. 181.
5. **Officers.—Cause of death of certain noncommissioned officer.**—A soldier suffering from syphilis was admitted to a post hospital and given intravenous injections of neo-arsphenamine and bismuth salicylate at various intervals. The soldier died, and a Military Board of Inquiry found that his death was due to reaction from the neo-arsphenamine injected during treatment, and that the treatment was given in a proper manner with the usual safeguards and by proper authority. There was no finding as to how the disease was acquired. 65.
6. **Same.**—*Held*, the soldier's death was not proximately caused by his own misconduct and did not "result" from such misconduct within the contemplation of the act of December 17, 1919, ch. 6 (41 Stat. 367). 65.
7. **Same.—Statutory disability of army officer convicted of crime.** Colonel Joseph I. McMullen, Judge Advocate General's Department, United States Army was convicted in the Supreme Court of the District of Columbia of violating Section 203, Title 18 of the United States Code, which provides, in part, that a person convicted thereunder shall be fined and imprisoned "and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States." Colonel McMullen appealed from the judgment of conviction and was admitted to bail. 468.
8. **Same.**—*Held*, The appeal did not stay the disqualification provision of the statute, and upon the entry of judgment and sentence Colonel McMullen, under the statute, became immediately incapable of holding any office of honor, trust, or profit under the Government of the United States. 468.

EFFECT OF DESERTION, WORLD WAR ADJUSTED COMPENSATION ACT. *See* WORLD WAR ADJUSTED COMPENSATION ACT, 1–3.

INTERCHANGE OF PROPERTY BETWEEN ARMY AND NAVY. *See* PROPERTY, 1–5.

ASSIGNMENT.

FEDERAL EMPLOYEE'S INVENTION TO UNITED STATES GOVERNMENT. *See* PATENTS, 1.

ATTORNEY GENERAL.

1. **Opinions reconsidered.**—The Opinion of the Attorney General to the Secretary of the Treasury of January 20, 1914 (30 Op. 252), holding that special assessment districts lawfully created for public purposes under the authority of the several

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ATTORNEY GENERAL—Continued.

states and authorized to exercise a portion of their respective sovereign powers are state political subdivisions within the meaning of the Revenue Act of 1913, **should not be disturbed.** 563.

2. **Internal revenue stamps.—Sale to manufacturer of fermented liquors.**—The **Attorney General declines to render an opinion** upon the question whether a collector of internal revenue must sell stamps evidencing payment of the taxes imposed by section 608 of the Act of February 24, 1919 (40 Stat. 1109) to a manufacturer of fermented liquors, **as this question is judicial in nature.** 1.

3. **Jurisdiction.—Certain cases in which the Attorney General will not render an opinion.**—The **Attorney General is without authority to render an opinion upon a question already considered and decided by the official presenting the question,** and he will decline to render an opinion upon a question contemporaneously pending before the courts for determination. 149.

QUESTIONS OF POLICY UPON WHICH NO ADVICE CAN BE GIVEN. *See* ARMY, 4.

OPINIONS, QUESTION OF RECONSIDERATION. *See* WORKMEN'S COMPENSATION FUND 1, 2.

PERMANENT CHANGE OF STATION FOR NAVAL OFFICER. *See* NAVY, 5.

POWER IN MATTERS OF COMPROMISE. *See* COMPROMISE, 8–11.

UNCERTAINTY OF COLLECTION UNDER INTERNAL REVENUE LAWS. *See* COMPROMISE, 2.

BANKHEAD COTTON CONTROL ACT. *See* TAXATION, 1–3.

BANKING ACT OF 1935.

INTEREST RATES ON POSTAL SAVINGS DEPOSITS. *See* POSTAL SAVINGS SYSTEM, 1–4.

POSTAL SAVINGS DEPOSITS, INTEREST RATES. *See* PHILIPPINE ISLANDS, 4.

BANKS AND BANKING.

RIGHT OF UNITED STATES TO CUMULATIVE PREFERRED DIVIDENDS. *See* FEDERAL HOME LOAN BANKS.

BATH, N. Y.

AUTHORITY OF VETERANS' AFFAIRS ADMINISTRATOR TO CONSENT TO ABANDONMENT OF HIGHWAY. *See* HIGHWAYS, 1.

BIDS.

REJECTION FOR FAILURE TO MEET SPECIFICATIONS IN GOVERNMENT CONTRACTS. *See* CONTRACTS, 2.

BIRD SANCTUARIES.

ACQUISITION OF LAND FOR. *See* LANDS, 3.

BLIND PERSONS.

EMBOSSED BOOKS. *See* BOOKS FOR THE BLIND, 1, 2.

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BONDS.

1. **Guaranty by United States of Bonds of Home Owners Loan Corporation and Federal Farm Mortgage Corporation.—The Home Owners Loan Act of 1933, as amended, and the Federal Farm Mortgage Corporation Act authorize, respectively, the** Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation **to issue bonds in prescribed amounts and provide, "Such bonds shall be fully and unconditionally guaranteed** both as to interest and principal by the United States", and all bonds issued thereunder recite that they are so guaranteed. 75.
2. **Same.**—*Held,* **if either corporation should default in payment** of either principal or interest **when due, the United States would thereupon become obligated to make such payment,** and its obligation would not be conditioned upon the institution of any proceeding by the bondholder against the corporation. 75.
3. **Home Owners' Loan Corporation and Federal Farm Mortgage Corporation—Issuance of duplicate bonds.**—The right to establish lost or destroyed bonds is an equitable right **not dependent upon express statuary provision.** 337.
4. **Same.—It is within the implied powers of a corporation to issue duplicates of lost or defaced bonds in proper cases;** and the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation may adopt for their bonds the provisions of the Federal statutes and regulations concerning lost, destroyed, or defaced bonds of the United States. 337.
5. **Same.**—Since the bonds of the said corporations are guaranteed by the United States, **there must be a concurrence of action by the corporations and the Secretary of the Treasury in the issuance of duplicate bonds.** 337.
6. **Same.—The issuance of duplicates of lost, destroyed, or defaced bonds** of the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation **by concurrent action of the corporation concerned and the Secretary of the Treasury is authorized** in cases coming within the corporate resolutions and also within the scope of sections 3702–3705 R. S., as amended, and the regulations issued thereunder by the Secretary of the Treasury. 337.
7. **Single bond.—Legality of use to cover two types of advances under different statutes.—Two bonds are required to be given the United States,** one of which is to be prescribed and approved by the Secretary of Agriculture, covering nonsubsistence expenses under the Act of June 3, 1902, U. S. C., Title 31, sec. 533, and the other to be prescribed and approved by the Secretary of the Treasury, covering subsistence expenses under the Subsistence Expense Act of 1926 and regulations issued thereunder. 247.

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BONDS—Continued.

8. **Same.**—*Held*, there is no legal objection to the taking of a single bond containing separate conditions covering the two types of advances and providing definitely in connection with each the amount of the penalty applicable thereto, the bond being prescribed and approved by the Secretary of Agriculture and the Secretary of the Treasury, each with respect to his own separate responsibility. 247.

GUARANTEED BY UNITED STATES. *See* NATIONAL HOUSING ACT, 3.

LEGALITY OF ISSUE. *See* PUERTO RICO, 8–15.

BOOKS FOR THE BLIND.

1. **Duty of the American Printing House for the Blind to furnish the Library of Congress copies of certain books.**—The provision contained in the Legislative, Executive, and Judicial Appropriation Act of the fiscal year ending June 30, 1914 (37 Stat. 739, 748), that the distribution of embossed books manufactured by the American Printing House for the Blind out of the income provided by the act of March 3, 1879, 20 Stat. 467, shall thereafter include one copy of every book so manufactured to be deposited in the Library of Congress, has the effect of amending the said act of March 3, 1879, and the American Printing House for the Blind is required to furnish the Library of Congress a copy of every embossed book manufactured out of the entire sum of its present annual appropriation of $75,000. 210.

2. **Same.**—The fact that administrative practice has been in accord with this view for nearly 16 years is entitled to great weight in determining the proper construction of the statute. 210.

BREACH OF ANTICIPATORY CONTRACT. *See* CONTRACTS, 3.

BRIDGE ALTERATIONS.

1. **Authority of Secretary of War to grant the Southern Railway Company an extension of time for altering bridge.**—Under date of September 20, 1929, the Secretary of War, pursuant to Section 18 of the Act of March 3, 1899, 30 Stat. 1153, issued an order requiring the Southern Railway Company to make certain alterations in its bridge over the Tombigbee River near Jackson, Alabama, within a specified time. Later, an extension of time was granted. The Railway Company having failed to make the prescribed alterations within the time specified in the order as extended, the Secretary, pursuant to the requirement of the statute, referred the matter to the Department of Justice; and subsequently the Railway Company was convicted under the statute, in a federal district court, of having willfully failed to comply with the Secretary's order, a fine of $1,000 being imposed. The Company appealed to the Circuit Court of Appeals and the appeal is now pending. 431.

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BRIDGE ALTERATIONS—Continued.

2. **Same.**—*Held*, **The Secretary of War is without authority to grant the Railway Company an extension of time for making the alterations** specified in the order. 431.

BUILDING SITES.

SUFFICIENCY OF NEVADA STATUTE CEDING JURISDICTION TO UNITED STATES. *See* JURISDICTION, 1–8.

BURIAL EXPENSES.

PAYMENT FOR ENLISTED MEN. *See* ARMY, 1.

BUY AMERICAN ACT.

GRANTS OF FUNDS BY GOVERNMENT TO STATES FOR EMERGENCY RELIEF. *See* EMERGENCY RELIEF.

CALIFORNIA.

TAXATION, COMPENSATION PAID FOR ADMINISTRATING STATE WORKMEN'S COMPENSATION FUND. *See* WORKMEN'S COMPENSATION FUND, 1, 2.

CANAL ZONE.

LEAVE OF ABSENCE. *See* LEAVE OF ABSENCE, 1, 2.

CARRIERS. *See* TRANSPORTATION RATES, 1, 2.

CARSON NATIONAL FOREST, N. MEX.

ADDITIONS, NATIONAL INDUSTRIAL RECOVERY ACT. *See* NATIONAL FORESTS.

CENSUS BUREAU.

Selection of personnel in connection with pending agricultural census.—The President has the power under section 1753 of the Revised Statutes and section 2 of the Civil Service Act of January 16, 1883, **to authorize the establishment of a special reemployment list for temporary employment in the Bureau of the Census** in connection with the pending agricultural census. (*See* Executive Order No. 6838 of September 1, 1934.) 43.

CHILDREN.

EFFECT OF NATURALIZATION OF PARENTS UPON FOREIGN-BORN AND ADOPTED CHILDREN. *See* CITIZENSHIP, 1–7, 10.

CITIZENSHIP.

1. **Adopted child.—A child under twenty-one years of age and actually resident within the United States becomes a citizen upon the naturalization of his mother**, under Section 2172 of the Revised Statutes, notwithstanding his previous adoption by another. 397.
2. **Same.**—The reasoning of the opinion of June 17, 1935, to the Secretary of State, relating to the citizenship of an adopted child, is applicable here. 397.
3. **Same.**—Miss S was born in Switzerland in May 1917 and adopted according to Swiss law in April 1921 by Mrs. S, then a citizen of Switzerland. Mrs. S emigrated to the United States in

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CITIZENSHIP—Continued.

June 1921 and was naturalized in December 1926. Miss S came to the United States in May 1927, and since then has resided with her adoptive mother in Ohio. 217.

4. **Same.**—The terms "child" and "children" occurring, respectively, in section 5 of the Act of March 2, 1907, 34 Stat. 1229, and section 4 of the Act of April 14, 1802, 2 Stat. 155, do not comprehend adopted children. 217.

5. **Same.**—*Held*, Miss S is not to be deemed a citizen of the United States by virtue of the naturalization of her adoptive mother. 217.

6. **Same.**—Under our immigration laws an adopted child may in some circumstances be considered a "child" of an adoptive parent but it does not follow that such child may be so considered within the contemplation of other and separate laws relating to citizenship. 217.

7. **Same.**—When doubts exist as to a grant of citizenship they should, generally, be resolved in favor of the United States and against the claimant. 217.

8. **Child born abroad of an American and an alien parent.**—A child born abroad subsequently to May 24, 1934, one of whose parents is a citizen of the United States and the other an alien, acquires American citizenship at birth. Such citizenship is subject to being divested if such child thereafter fails to comply with the two conditions prescribed in section 1 of the Act of May 24, 1934 (48 Stat. 797), which must be regarded as conditions subsequent and not as conditions precedent. 10.

9. **Natives of the Virgin Islands.**—Except as indicated all persons born in the Virgin Islands who were absent from those Islands at the time of their annexation by the United States but were residing in the United States or any of its insular possessions or territories on June 28, 1932, are to be deemed citizens of the United States under the Act of February 25, 1927, 44 Stat. 1234, as amended. 525.

CIVIL SERVICE.

1. **Certification.**—Amendment of civil service rule VII.—Section 165 R. S. providing that women may, in the discretion of the head of any department, be appointed to any clerkship therein upon the same requisites and conditions prescribed for men, has not been repealed by the Civil Service Act and the President is without authority under that Act to amend paragraph (a) of section 1 of Civil Service Rule VII governing certification by requiring that certification shall be made without regard to sex unless sex is specified in the request and the request is approved by the Civil Service Commission. (*See* Executive Order No. 6866 of October 5, 1934.) 77.

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CIVIL SERVICE—Continued.

2. Reinstatement.—Construction of civil service rule IX.—The Civil Service Commission is not authorized under Civil Service Rule IX, governing reinstatement, to apply the law of apportionment in the reinstatement of persons to the apportioned services, but may disregard such law in such reinstatement. 33.

3. Same.—An employee whose name is removed from the apportioned and unapportioned registers upon his acceptance of an appointment to an unapportioned position may be accorded a status of eligibility for reinstatement to a position in the apportioned services as of the date his vacated position was reached in the register. 33.

4. Retirement.—Exemption of American minister to Albania from compulsory retirement.—Section 204 of the Economy Act of June 30, 1932, 47 Stat. 404, supersedes section 26 (d) of the Act of February 28, 1931, 46 Stat. 1211, insofar as the latter section authorizes the President to continue persons in the service of the United States. 40.

5. Same.—A foreign service officer becomes eligible for retirement August 16, 1934, under section 26 (n) of the Act of February 28, 1931, *supra*. *Held*, that such officer does not reach the age prescribed for automatic separation from the service until September 1, 1934. (*See* Executive Order No. 6834 of August 29, 1934.) 40.

COMPETITIVE EXAMINATIONS REQUIRED OF CERTAIN EMPLOYEES REINSTATED IN TREASURY DEPARTMENT. *See* EMERGENCY APPROPRIATION ACT, 1935, 1–3.

EMPLOYEES TRANSFERRED BY EXECUTIVE ORDER FROM PROHIBITION BUREAU AND ALCOHOLIC BEVERAGE UNIT TO TREASURY DEPARTMENT. *See* EMERGENCY APPROPRIATION ACT, 2.

REAPPOINTMENT, MCKELLAR AMENDMENT. *See* EMERGENCY APPROPRIATION ACT, 1935, 3, 4.

REEMPLOYMENT LIST FOR AGRICULTURAL CENSUS, PRESIDENT MAY AUTHORIZE ESTABLISHMENT. *See* CENSUS BUREAU.

REINSTATEMENT, MCKELLAR AMENDMENT. *See* EMERGENCY APPROPRIATION ACT, 1935, 3, 4.

RETIREMENT. *See* RETIREMENT, 2.

STATUS OF EMPLOYEES OF THE RAILROAD RETIREMENT BOARD. *See* RETIREMENT, 1.

CIVILIAN CONSERVATION CORPS.

CLAIMS FOR DAMAGES CAUSED BY MEMBER. *See* CLAIMS, 5.

CLAIMS.

1. American Smelting and Refining Company.—Claim arising out of a British seizure of lead shipped on the German vessel "Kronprinzessin Cecilie" in 1914.—The United States and Great Britain, by an informal exchange of notes dated May 19, 1927, agreed that neither country would press any

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CLAIMS—Continued.

diplomatic claim or request arbitration on behalf of a citizen alleging loss or damage through war measures adopted by the other, and that such claims of citizens would be referred for final settlement to the proper judicial or administrative tribunal of the Government against which the claim was asserted. However, the United States reserved the right to satisfy disallowed claims of American citizens out of moneys saved to it through a certain waiver on the part of the British Government. 322.

2. **Same.**—*Held, further*, that the questions submitted in connection with the claim of the American Smelting and Refining Company arising out of a British seizure of lead shipped on the German vessel *Kronprinzessin Cecilie*, in 1914, do not require specific determination. 322.

3. **Same.**—*Held*, that such reservation contemplates exceptional cases, readily distinguishable, and does not warrant examination in this country of every adjudication of British courts unfavorable to American claims. 322.

4. **American Legion posts.**—The Act of May 29, 1934, Public No. 265, Seventy-third Congress, has the effect of releasing and canceling as to both principal and surety all claims existing prior to passage of that act and resulting from loss of property lent to American Legion Posts pursuant to the act of February 10, 1920, as amended. 25.

5. **Consideration of claim of City of Cleveland.**—The Secretary of the Interior is authorized to consider under the Act of December 28, 1922, c. 16, 42 Stat. 1066, a claim of the City of Cleveland, Ohio, in the amount of $69.41, for damage to a fire hydrant resulting from its being struck by a truck operated by an enrollee of the Civilian Conservation Corps. 514.

COMPENSATION TO ARMY PERSONNEL FOR LOST OR DAMAGED PROPERTY. *See* ARMY, 3, 4.

COMPROMISE OF CLAIMS. *See* COMPROMISE, 3–5, 8–11.

CLASSIFICATION ACT.

STATUS OF EMPLOYEES OF RAILROAD RETIREMENT BOARD. *See* RETIREMENT, 1.

CLEVELAND, OHIO.

CLAIM FOR DAMAGES CAUSED BY A MEMBER OF CIVILIAN CONSERVATION CORPS. *See* CLAIMS, 5.

COAL.

BITUMINOUS COAL ACT, 1935. *See* SHIPPING, 1.

COAST GUARD.

CONTRACTS FOR ALTERATION OR REPAIR OF VESSELS. *See* SHIPPING, 1.

COASTWISE LOAD-LINE ACT 1935.

ESTABLISHMENT OF LOAD LINES. *See* LOAD LINE OF VESSELS.

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COMMERCE, SECRETARY OF.

DISPOSITION OF SURPLUS REAL PROPERTY. *See* REAL PROPERTY, 2; STATUTES.

FACTORS IN ESTABLISHING LOAD LINES. *See* LOAD LINE OF VESSELS.

MEMBER OF BOARD ON FOREIGN TRADE ZONES. *See* FOREIGN TRADE ZONES, 1, 2.

REMISSION OF FINES, PENALTIES AND FORFEITURES FOR VIOLATION OF SHIPPING ACT. *See* SHIPPING, 5.

COMMODITY CREDIT CORPORATION.

REFINANCING CERTAIN INDEBTEDNESS TO RECONSTRUCTION FINANCE CORPORATION. *See* DEBENTURES, 3, 4.

COMMON CARRIERS. *See* TRANSPORTATION RATES, 1, 2.

COMMUNITY USE.

CONVEYANCE OF LAND, FEDERAL SUBSISTENCE HOMESTEADS CORPORATION. *See* SUBSISTENCE HOMESTEADS, 3.

COMPENSATION.

APPLICATION OF DEFINITIONS OF RELATIONSHIP AND DEPENDENCY. *See* WORLD WAR VETERANS ACT.

DESERTION OF SOLDIER FOR COMPENSABLE PERIOD. *See* WORLD WAR ADJUSTED COMPENSATION ACT, 1–3.

COMPROMISE.

1. **Cases involving the forfeiture of vehicles seized for violation of the internal revenue laws.—The primary object of the Government in requiring a forfeiture of a vehicle for violation of its laws is to punish the violator by depriving him of his property,** but the Government is also interested in obtaining the greatest amount possible in disposing of the vehicle. 194.
2. **Same.—In considering compromise offers submitted in cases involving the forfeiture of vehicles** seized for violation of internal revenue laws, the **inability of the Government to obtain from a sale of the vehicle,** after deducting the expenses of forfeiture and sale, **as much as the amount offered in compromise may be treated as uncertainty as to collection,** within the meaning of that term as used in the opinions of the Attorney General to the Secretary of the Treasury dated October 24, 1933, and October 2, 1934. 194.
3. **Final judgments.—Claims under sections 3469 and 3229 of the Revised Statutes.**—The Secretary of the Treasury (upon the recommendation of the Solicitor of the Treasury and any District Attorney or special attorney or agent in charge of the claim) is without authority under section 3469 of the Revised Statutes to compromise a final judgment if there is no doubt that the judgment can be collected in full. 94.
4. **Same.**—The Commissioner of Internal Revenue (with the advice and consent of the Secretary of the Treasury and the Attorney General, the latter in cases in which suit has been commenced), is without authority under section 3229 of the

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COMPROMISE—Continued.

Revised Statutes to compromise a case if there is no doubt either as to the legality of the claim or as to the collectibility thereof. 94.

5. **Same.**—The rule is the same as to the compromise of interest and penalties. 94.

6. **Offenses against the Harrison Narcotic Act in Puerto Rico.**—Offenses committed in Puerto Rico against the Harrison Narcotic Act may be compromised under section 3229 of the Revised Statutes. Such compromises may be made by the local authorities and the proceeds thereof may be retained by the Puerto Rican Government. 381.

7. **Same.**—Where doubt exists as to the construction of a statute great weight is properly given to the construction given it by the Executive Department charged with its Administration, and such construction is not to be overturned unless clearly wrong or unless a different construction is plainly required. 381.

8. **Power of the Attorney General in matters of compromise.**—The opinion of the Attorney General to the Secretary of the Treasury dated October 24, 1933, relating to the power to compromise conferred by sections 3469 and 3229 of the Revised Statutes, is not to be construed as precluding the compromise of cases in which there is uncertainty as to liability or collection; nor is that opinion to be understood as involving or restricting the authority and discretion of the Attorney General in matters of compromise. 98.

9. **Same.**—In cases referred to the Department of Justice, whatever powers of compromise were conferred by sections 3469 and 3229 R. S., are now vested in the Attorney General by virtue of section 5 of Executive Order No. 6166 of June 10, 1933. 98.

10. **Same.**—The Attorney General has plenary power to compromise cases referred to the Department of Justice. This power is in part inherent, appertaining to the office, and in part derived from various statutes and decisions. 98.

11. **Same.**—The Treasury Department has no discretion to review on the merits the action of the Attorney General in accepting an offer of compromise in a case under his control. 124.

12. **Same.**—Section 5 of Executive Order No. 6166 of June 10, 1933, vests in the Attorney General exclusive control over any case after reference thereof to the Department of Justice. However, the Attorney General has plenary power, in part inherent in his office and in part derived from statutes and decisions, to compromise any case over which he has jurisdiction upon such terms as he may deem fit. 124.

13. **Same.**—An offer of compromise accepted in accordance with law is binding upon the United States and its officers as well as the taxpayer. 124.

14. **Same.**—The duty of one executive officer to carry into effect the discretionary acts of another is ministerial. 124.

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COMPTROLLER GENERAL.

BOUND BY ATTORNEY GENERAL'S CONSTRUCTION OF STATUTE RELATING TO PERMANENT CHANGE OF STATION OF NAVAL OFFICER. *See* NAVY, 7.

JURISDICTION IN CONNECTION WITH ADJUDICATION OF CLAIMS FOR LOST PROPERTY BY SECRETARY OF WAR. *See* ARMY, 3, 4.

JURISDICTION IN MATTER OF LOSSES OF UNITED STATES EMPLOYEES THROUGH FOREIGN EXCHANGE. *See* EXCHANGE, 2.

NONAVAILABILITY OF FUNDS, PURCHASE OF RADIO TRANSMISSION EQUIPMENT. *See* CONTRACTS, 3.

PERMANENT CHANGE OF STATION FOR NAVAL OFFICER. *See* NAVY, 5.

CONFIDENTIAL INFORMATION.

Agricultural Adjustment Act.—Authority of Secretary of Agriculture to disclose confidential information obtained from milk distributors licensed under the act.—Section 10 (i) of the Agricultural Adjustment Act, as amended by section 18 of the Act of August 24, 1935, does not authorize the Secretary of Agriculture to disclose to State authorities confidential information furnished by licensed milk distributors prior to the date of the amendment, in violation of the conditions (embodied in regulations and licenses) under which it was obtained. 378.

CONGRESS.

ACT PROVIDING ALLOTMENT IN SEVERALTY OF INDIAN LANDS. *See* INDIAN LANDS, 2, 3.

AGENCIES CREATED TO EXERCISE FEDERAL POWERS. *See* NATIONAL HOUSING ACT, 1–3.

APPROPRIATION FOR ARCHIVES BUILDING, RESPONSIBILITY FOR OPERATION AND MAINTENANCE. *See* NATIONAL ARCHIVES, 6.

CONSENT TO ABANDONMENT OF HIGHWAY, BATH, N. Y. *See* HIGHWAYS, 1.

EMPLOYMENT OF MEMBER AS ATTORNEY BY RECONSTRUCTION FINANCE CORPORATION. *See* RECONSTRUCTION FINANCE CORPORATION, 1, 2.

THOMAS JEFFERSON MEMORIAL. *See* THOMAS JEFFERSON TERRITORIAL EXPANSION MEMORIAL, 5.

CONSTITUTIONAL CONVENTION PHILIPPINE ISLANDS

PROPOSED CONSTITUTION FOR PHILIPPINE ISLANDS. *See* PHILIPPINE ISLANDS, 1, 2.

CONSTITUTIONAL LAW.

AUTHORITY OF MINISTERIAL OFFICER TO QUESTION VALIDITY OF STATUTES. *See* DISBURSING OFFICERS, 1–4.

GENERAL WELFARE CLAUSE. *See* NATIONAL HOUSING ACT, 5, 6, 8.

RAILROAD RETIREMENT ACT. *See* RETIREMENT, 3.

TREASURY DEPARTMENT, AUTHORITY TO CONTINUE DISBURSEMENTS UNDER A LAW HELD UNCONSTITUTIONAL. *See* DISBURSING OFFICERS, 1–4.

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CONSTRUCTION.

NAVAL VESSELS. *See* NAVY, 1, 2.

SHENANDOAH-GREAT SMOKY MOUNTAIN NATIONAL PARKWAY. *See* HIGHWAYS, 2.

CONTRACTS.

1. **Government contracts for supplies.—The Robinson-Patman Act** of June 19, 1936, which makes it unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities in the circumstances therein stated, **is not applicable to Government contracts for supplies.** 539.
2. **Legality of award of contracts for radio transmitting equipment.—** A bid on a Government contract specifying an article materially different from the articles specified in the invitation for bids is properly rejected, notwithstanding the fact that the bid is accompanied by a statement to the effect that in the opinion of the bidder the article offered is in strict compliance with the Government specifications and that any deviation therefrom should be regarded as an error in the bidder's specifications and not as an exception to the Government specifications. 555.
3. **Same.**—Where funds are available for the purchase of certain articles and a valid contract therefor has been made by the Government, a decision or statement by the Comptroller General of the United States that appropriated funds are not available for payments under the contract may not be treated by the contractor as an anticipatory breach. 555.
4. **Remaking of cotton mattresses, etc.—Applicability of the act of August 24, 1935—the conclusions reached in the opinion of this date to the Secretary of the Treasury with respect to the** applicability of the Act of August 24, 1935, 49 Stat. 793, and certain other acts, **to construction, alteration, and repair of U. S. Coast Guard vessels, boats, and aircraft, constitute the answer to the question whether the said Act of August 24, 1935, is applicable to contracts in excess of $2,000 for the remaking of cotton mattresses** owned by the Government and the manufacture of uniforms from cloth owned by the Government, and other contracts of a similar nature. 424.

CONSTRUCTION, ALTERATION, AND REPAIR OF COAST GUARD VESSELS, ETC. *See* SHIPPING, 1.

EIGHT-HOUR LAW, CONSTRUCTION WITH REFERENCE TO DREDGE WORKERS. *See* EIGHT-HOUR LAW.

EXTENSION OF TIME FOR ALTERING A CERTAIN RAILROAD BRIDGE. *See* BRIDGE ALTERATIONS, 1, 2.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION. *See* SUBSISTENCE HOMESTEADS, 17.

MEMBERS OF CONGRESS, EMPLOYMENT AS ATTORNEYS BY RECONSTRUCTION FINANCE CORPORATION. *See* RECONSTRUCTION FINANCE CORPORATION, 1, 2.

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CONTRACTS—Continued.

OCEAN MAIL SERVICE. *See* OCEAN MAIL SERVICE, 1, 2.

RATES TO GOVERNMENT, CARRIERS BY MOTOR VEHICLES. *See* TRANSPORTATION RATES, 1, 2.

STATUTORY REQUIREMENTS FOR PUBLIC CONTRACTS. *See* SHIPPING, 7.

CONVEYANCES. *See* REAL PROPERTY, 2.

COTTON.

1. **Refinancing an indebtedness against cotton acquired under the Agricultural Adjustment Act.—Relative to the proposed plan of the Secretary of Agriculture** herein described, for refinancing an indebtedness of $100,000,000 outstanding against approximately 2,000,000 bales of cotton acquired under the provisions of the Agricultural Adjustment Act, **held that the Secretary is authorized to make the proposed loan and that he may re-pledge the cotton to secure the loan thus obtained.** 18.
2. **Same.**—The **proposed form of the note to be used** by the Secretary of Agriculture in connection with said refinancing plan **is without legal objection.** 18.

DISTRIBUTION OF LOAN TO MEMBERS OF COTTON POOL. *See* LOANS, 2.

SUSPENSION OF TAX ON COTTON. *See* TAXATION, 1–3.

COTTON PRODUCERS POOL. 1933.

MONEY ADVANCED TO MANAGER BY SECRETARY OF AGRICULTURE. *See* LOANS, 2.

COUNTERVAILING DUTIES. *See* CUSTOMS LAWS, 1, 2.

COURTS.

QUESTIONS PENDING BEFORE THE COURTS. *See* ATTORNEY GENERAL, 3.

CRIME.

STATUTORY DISABILITY OF ARMY OFFICER CONVICTED OF CRIME. *See* ARMY, 7, 8.

CUBAN TRADE AGREEMENT.

RATES OF DUTY ON TOBACCO. *See* CUSTOMS LAWS, 3, 4.

CUSTOMS LAWS.

1. **Imports from Germany.—Imposition of countervailing duties.—The practices and devices of the German government described herein constitute the paying or bestowing of bounties or grants within the meaning of Section 303 of the Tariff Act of 1930; and the Secretary of the Treasury is required** under that Act **to impose countervailing duties** upon articles imported from Germany in respect of which bounties or grants are paid or bestowed by reason of such practices and devices. 489.
2. **Same.**—The Treasury Decision proposed to be issued by the Secretary of the Treasury is within the requirements of the said Section 303, and its form is appropriate for carrying out the mandate of that statute. 489.

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CUSTOMS LAWS—Continued.

3. **Tobacco imported from Cuba.—Effective date of increased rates of duty.**—The increased rates of duties prescribed in Schedule II of the Cuban Trade Agreement of September 3, 1934, will become effective immediately when the Secretary of Agriculture gives public notice that the cigar tobacco adjustment program in the United States has been abandoned or substantially abandoned. 428.
4. **Same.—The public notice referred to above is not an "administrative ruling"** within the meaning of that term as used in Article XIII of the Cuban Trade Agreement. 428.

DEBENTURES.

1. **Guaranty by the United States of the debentures of the Federal Housing Administrator.—If the Federal Housing Administrator should fail, upon demand by a bona fide and accredited holder of debentures** of the Federal Housing Administration, to pay either principal or interest when due, the United States would thereupon become obligated under its guaranty to make such payments; and such obligation of the United States would not be conditioned upon the institution of any proceeding by the holder of the debentures against the Administrator or against the fund set up as provided in the statute. 319.
2. **Issuance of duplicates of lost or destroyed debentures of the Federal Housing Administration.**—The issuance of duplicates of lost or destroyed debentures of the Federal Housing Administrator **which are guaranteed by the United States,** is governed by the principles set forth in the opinion of October 14, 1935, to the Secretary of the Treasury respecting the issuance of duplicate bonds by the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation 518.
3. **Refinancing certain indebtedness to Reconstruction Finance Corporation.—The Commodity Credit Corporation is authorized as an agency of the United States** to issue its notes or debentures for refinancing its indebtedness to the Reconstruction Finance Corporation in accordance with the plan outlined. 508.
4. **Same.**—The Reconstruction Finance Corporation is authorized to make available to the Commodity Credit Corporation, if necessary, sufficient funds to enable the latter to pay at maturity the notes or debentures which it proposes to issue for the purpose above stated. 508.

GUARANTY BY UNITED STATES. *See* NATIONAL HOUSING ACT, 7, 9, 10.

ISSUABLE IN PAYMENT OF LOSS, NATIONAL HOUSING ACT *See* MORTGAGES, 3, 4.

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DEBTOR NATIONS.

1. **Status of nations making "token payments" on obligations to United States.**—It was a necessary effect of the Act of April 13, 1934 (c. 112, 48 Stat. 574), as interpreted in the opinion of May 5, 1934, to exclude as a "default" such partial failure theretofore occurring as resulted from the making and acceptance of so-called "token payments", and if a Government which made such a payment should pay the full amount of the next installment due on its indebtedness to the United States, it would not be "in default", within the meaning of the term as used in that Act. 580.
2. **Same.**—The Act of April 13, 1934, being penal, should not be unduly extended by construction. 580.

DEDICATION OF LAND TO CITY, ETC. *See* LANDS, 1.

DELEGATION OF POWERS. *See* PUERTO RICO, 4, 5.

DEPENDENCY.

APPLICATION OF DEFINITION, WORLD WAR VETERANS ACT. *See* WORLD WAR VETERANS ACT.

DEPOSITORIES.

PUBLIC MONEYS, PHILIPPINE ISLANDS. *See* PHILIPPINE ISLANDS, 4.

DEPOSITS.

POSTAL SAVINGS FUNDS. *See* POSTAL SAVINGS SYSTEM, 1–4.

DESERTION.

WORLD WAR ADJUSTED COMPENSATION ACT. *See* WORLD WAR ADJUSTED COMPENSATION ACT, 1–3.

DISBURSING OFFICERS.

1. **Duty to make disbursements required under the Agricultural Adjustment Act.**—A ministerial officer may not question the validity of a statute which, so far as he is concerned, merely imposes upon him a proper duty and has no bearing upon his constitutional rights. 252.
2. **Same.**—A ministerial officer cannot safely rely upon judicial decisions which have not become final and are not binding in jurisdictions other than those in which they are rendered, particularly if there is a conflict of decision, as in the instant case. 252.
3. **Same.**—A decision of the Circuit Court of Appeals for the First Circuit is not binding as a rule of decision in the District of Columbia, where the disbursing officers herein concerned are located. 252.
4. **Same.**—Notwithstanding the fact that the Circuit Court of Appeals for the First Circuit has held the Agricultural Adjustment Act to be unconstitutional in certain respects, pending decision of the Supreme Court on appeal or in the absence of a change in the act by the Congress, the disbursing officers of the Treasury should continue to make the disbursements required under the act. 252.

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DISBURSING OFFICERS—Continued.

ARMY, PAYMENT OF CLAIM DISALLOWED BY COMPTROLLER GENERAL. *See* ARMY, 4.

DISTRICT OF COLUMBIA.

1. **Wage law applicable to Alley Dwelling Authority.—The Alley Dwelling Authority for the District of Columbia is subject to the wage provisions of the Act of March 3, 1931, c. 411,** (46 Stat. 1494), as herein interpreted, and it **is not subject to the wage provisions of section 206 of title II of the National Industrial Recovery Act;** and any moneys which may be administratively allocated to the authority from funds appropriated by the Emergency Relief Appropriation Act of 1935 must be expended in accordance with the provisions of that act and Executive orders issued thereunder. 229.
2. **Same.**—The Act of March 3, 1931, is restricted to "construction, alteration, and/or repair", and this does not include the demolition of existing structures. The act applies only to contracts "in excess of $5,000 in amount" and only to "laborers and mechanics employed by the contractor or any subcontractor." 229.
3. **The Recorder of Deeds of the District of Columbia is an officer of the municipal government of the District of Columbia.** Such officer is required by law to submit estimates for appropriations for his office to the Commissioners of the District of Columbia, and to submit to hearings by the Commissioners on such estimates. 155.

DIVIDEND DISTRIBUTION. *See* FEDERAL HOME LOAN BANKS.

DREDGE WORKERS.

EIGHT-HOUR LAW. *See* EIGHT-HOUR LAW.

DROUGHT STRICKEN AREA.

MENACED BY JAPANESE BEETLE INFESTATION OF ST. LOUIS, MO. *See* JAPANESE BEETLE CONTROL, 1.

DRUG ADDICTS.

TRANSFER TO NARCOTIC FARMS. *See* NARCOTIC FARMS.

ECONOMY ACT, 1932.

STATUS OF EMPLOYEES OF RAILROAD RETIREMENT BOARD. *See* RETIREMENT, 1.

EFFICIENCY RATINGS.

MINIMUM FOR MILITARY PREFERENCE WHEN REDUCTIONS IN FORCE ARE MADE. *See* MILITARY PREFERENCE, 1, 2.

EIGHT-HOUR LAW.

Construction of law with reference to dredge workers.—Members of the crew of a dredge or other like floating plant are not laborers or mechanics within the meaning of the act of June 19, 1912, 36 Stat. 137, relating to the employment of laborers and mechanics on work performed under contract for the United States, **and the provisions of the act are not applicable to their employment.** 150.

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ELECTIONS.

OFFICERS, PHILIPPINE ISLANDS. *See* PHILIPPINE ISLANDS, 5.

EMBEZZLEMENT.

FUNDS OF FEDERAL RESERVE BANKS, ETC. EMBEZZLEMENT BY OFFICERS OR EMPLOYEES. *See* SECRET SERVICE, 3, 4.

EMERGENCY APPROPRIATION ACT, 1935.

1. **Applicability of proviso in Bureau of Internal Revenue appropriation.**—The **proviso** contained in the Emergency Appropriation Act, fiscal year 1935, under the heading "Bureau of Internal Revenue" **does not affect employees who were not actually separated from service in the Bureau of Prohibition or the Alcoholic Beverage Unit, Department of Justice, between June 10 and December 31, 1933,** and who were transferred to the Treasury Department by Executive Order No. 6639 of March 10, 1934. 113.
2. **Same.**—**The said proviso applies to employees who were reinstated to their positions by the Treasury Department upon the basis of a classified civil-service status** and requires such employees to take new, open competitive examinations. 113.
3. **Scope of proviso contained in Bureau of Internal Revenue appropriation.**—**The proviso contained in the appropriation for collecting the internal revenue made by the Emergency Appropriation Act, fiscal year 1935,** and herein set out, **applies to all persons who were separated from the service of the Bureau of Prohibition and the Alcoholic Beverage Unit of the Department of Justice** between June 10, 1933, and December 31, 1933, either by Executive Order No. 6166 of June 10, 1933, or by direct action of the Department of Justice, including those who were reappointed without break in service or within 4 months under authority of the said Executive Order, or who were subsequently reinstated under Civil Service Rule IX. 50.
4. **Same.**—**The said proviso is not limited in its application to positions in the Bureau of Internal Revenue** but applies to all positions in the Treasury Department similar in *type* or *kind* to those formerly existing in the Bureau of Prohibition and the Alcoholic Beverage Unit. 50.
5. **Status of employees affected by McKellar proviso.**—**The Secretary of the Treasury is not required by the McKellar proviso** contained in the Emergency Appropriation Act, fiscal year 1935, **to remove from the service the employees affected thereby either by outright separation or by a partial dismissal in the form of furlough** and he may continue such employees in a duty status without pay. 139.

EMERGENCY RELIEF.

Applicability of Title III of the Treasury and Post Office Appropriation Act, fiscal year 1934, to grants to the governors of the several States.—**Grants from funds appropriated by**

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EMERGENCY RELIEF—Continued.

Public Resolution No. 11, approved April 8, 1935, to the Governors of the several States for emergency relief purposes are projects within the meaning of section 13 of that Resolution, whether for construction work or for the purchase of such items as food and clothing; and such grants are subject to the provisions of Title III of the Treasury and Post Office Appropriation Act, fiscal year 1934 (47 Stat. 1520). 207.

FUND, AVAILABLE FOR JAPANESE BEETLE CONTROL, DROUGHT AREAS. *See* JAPANESE BEETLE CONTROL, 2.

EMERGENCY RELIEF APPROPRIATION ACT.

PUERTO RICO RECONSTRUCTION ADMINISTRATION, RELIEF AGENCY. *See* PUERTO RICO, 1, 2.

THOMAS JEFFERSON MEMORIAL, FEDERAL PROJECT. *See* THOMAS JEFFERSON TERRITORIAL EXPANSION MEMORIAL, 2.

USE OF FUNDS ALLOCATED TO PRESIDENT, AUTHORIZED BY EXECUTIVE ORDER. *See* LANDS, 3.

EMPLOYEES' COMPENSATION COMMISSION.

EMPLOYEES OF FEDERAL SUBSISTENCE HOMESTEADS CORPORATION. *See* SUBSISTENCE HOMESTEADS, 12.

ENLISTED MEN.

BURIAL EXPENSES. *See* ARMY, 1.

EXCHANGE.

1. **Payment of losses of United States employees in Union of Soviet Socialist Republics due to appreciation of currency of that country in relation to the American dollar.**—Although purchases made by employees of the United States in the Union of Soviet Socialist Republics are paid for with American dollars, nevertheless, by reason of the fact that prices are quoted in terms of, and payable at the rate of exchange for, the theoretical, nonexistent gold ruble, such employees sustain actual losses due to the appreciation of a foreign currency in its relation to the American dollar; and payment of such losses is authorized under the act of March 26, 1934 (Pub. No. 129, 73d Cong.), and Executive Order No. 6657-A of March 27, 1934, issued pursuant thereto. 71.
2. **Same.—Under the provisions of the Act of March 26, 1934,** *supra* **the question as to what constitutes loss thereunder is solely for the determination of the President,** and the Comptroller General is without jurisdiction in the matter. (*See* Executive Order No. 6850 of September 18, 1934.) 71.

EXECUTIVE DEPARTMENT.

CONSTRUCTION OF STATUTES BY DEPARTMENT ADMINISTERING THEM GIVEN GREAT WEIGHT. *See* COMPROMISE.

REDUCTIONS IN FORCE, MINIMUM EFFICIENCY RATINGS REQUIRED FOR MILITARY PREFERENCE. *See* MILITARY PREFERENCE, 1.

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FEDERAL AGENCIES.

DISPOSITION OF SURPLUS REAL PROPERTY. *See* REAL PROPERTY, 1, 2; STATUTES.

FEDERAL BUREAU OF INVESTIGATION.

EMBEZZLEMENT OF FUNDS OF FEDERAL RESERVE BANKS SUBJECT TO INVESTIGATION. *See* SECRET SERVICE, 3, 4.

FEDERAL DEPOSIT INSURANCE CORPORATION.

OFFENSES AGAINST, JURISDICTION. *See* SECRET SERVICE, 1, 2.

FEDERAL EMERGENCY RELIEF ACT.

HEALTH SERVICE IN RURAL AREAS. *See* PUBLIC HEALTH SERVICE, 1, 2.

FEDERAL EMERGENCY RELIEF ADMINISTRATION.

PURCHASE OF LAND AS AGENT OF PUBLIC WORKS ADMINISTRATION. *See* NATIONAL FORESTS.

FEDERAL EMPLOYEES.

APPORTIONMENT IN CIVIL SERVICE REINSTATEMENT. *See* CIVIL SERVICE, 2, 3.

ELIGIBILITY FOR REINSTATEMENT TO APPORTIONED SERVICE. *See* CIVIL SERVICE, 2, 3.

LOSSES IN U. S. S. R. DUE TO RATE OF EXCHANGE. *See* EXCHANGE, 1, 2.

PATENTS GRANTED WITHOUT PAYMENT OF FEES. *See* PATENTS, 4–10.

REINSTATEMENT UPON BASIS OF CLASSIFIED CIVIL-SERVICE STATUS, COMPETITIVE EXAMINATIONS. *See* EMERGENCY APPROPRIATION ACT, 1935, 1–3.

SALARIES FROM SOURCES OUTSIDE THE GOVERNMENT. *See* PUERTO RICO, 1, 2.

STATUS OF EMPLOYEES AFFECTED BY MCKELLAR AMENDMENT. *See* EMERGENCY APPROPRIATION ACT, 1935, 5.

FEDERAL FARM MORTGAGE CORPORATION.

DUPLICATES OF BONDS LOST OR DESTROYED. *See* BONDS.

GUARANTY OF BONDS BY UNITED STATES. *See* BONDS, 1, 2.

FEDERAL HOME LOAN BANKS.

Right of the United States to cumulative preferred dividends on stock.—Under Section 6 (k) of the Federal Home Loan Bank Act of July 22, 1932, as amended by Section 2 of the Act of May 28, 1935, c. 150, 49 Stat. 293, the United States is not entitled to the payment of preferred dividends on stock of Federal Home Loan Banks accumulated to the date of the amendatory act, and all stock of any bank is entitled to share in all dividends declared and paid subsequent to that date without preference. 482.

FEDERAL HOUSING ADMINISTRATION.

DEBENTURES GUARANTEED BY UNITED STATES. *See* DEBENTURES, 1.

ISSUANCE OF DUPLICATES OF LOST OR DESTROYED DEBENTURES. *See* DEBENTURES, 2.

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FEDERAL REGISTER.

DOCUMENTS PUBLISHED TO OPERATE AS CONSTRUCTIVE NOTICE. *See* NATIONAL ARCHIVES, 1, 2.

TIME OF PUBLICATION. *See* FEDERAL REGISTER ACT, 1.

FEDERAL REGISTER ACT.

1. Questions relating to the administration of the Federal Register Act.—The publication of the Federal Register is not required by the Federal Register Act to be commenced until the appropriations to the Government Printing Office have been increased as provided for in section 9 of the Act, but such publication should commence on the date such increased appropriations are made available. 276.

2. Same.—The provisions of section 2 of the Act requiring the filing of documents with the director of the Federal Register Division in the National Archives, Establishment and the making of copies of such documents available for public inspection do not become effective until the appropriations for the Government Printing Office have been increased a above stated, but such provisions will become effective the date such appropriations are made available. 276.

3. Same.—The provisions of section 11 of the Act requiring agencies of the Government to prepare and file with the mittee the compilation of all documents referred to section became effective on July 26, 1935, the date was approved, and each agency is required to pr file such compilation within 6 months after that

4. Same.—Funds heretofore appropriated for the Natio are available for payment of the salary of the D Division of the Federal Register. 276.

PUBLICATION OF DOCUMENTS IN FEDERAL NATIONAL ARCHIVES, 1, 2.

FEDERAL REGISTER DIVISION.

APPOINTMENT OF DIRECTOR. *See* NATION

SALARY OF DIRECTOR. *See* NATIONAL AR

FEDERAL RESERVE ACT.

JURISDICTION OF SECRET SERVICE. *See*

FEDERAL SUBSISTENCE HOMESTEADS COR

AUTHORITY TO CONVEY LAND AND BU HOMESTEADS, 2.

FUNDS FOR CONSTRUCTION OF HOMESTEADS, 7.

STATUS, FUNCTIONS, ETC. *See* S

FEDERAL WATER POWER ACT, 1920.

POWER PROJECT. *See* RECLA

FEDERAL WATER POWER COMMIS

POWER. *See* RECLAMATION

FEES.

APPLICATION FOR PATEN

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FINES.

Remission, for Violation of the Shipping Act, 1916, as Amended. *See* Shipping, 5.

FIRE PROTECTION.

Occupants of Subsistence Homesteads. *See* Subsistence Homesteads, 10.

FORECLOSURE.

Mortgages Under Which Proceedings Have Been Commenced, or Right has Accrued. *See* Mortgages, 3, 4.

FORFEITURE.

Vehicles, under Internal Revenue Laws. *See* Compromise, 1, 2.

Vessels, Violation of the Shipping Act, 1916, as Amended. *See* Shipping, 5.

FOREIGN CORPORATIONS.

Federal Subsistence Homesteads Corporation. *See* Subsistence Homesteads, 16.

FOREIGN EXCHANGE.

Losses, by Federal Employees. *See* Exchange, 1, 2.

FOREIGN GOVERNMENTS.

Status of those Making "Token Payments" on Obligations to United States. *See* Debtor Nations, 1, 2.

FOREST SERVICE.

Officer, Exemption from Compulsory Retirement. *See* Civil Service, 4, 5.

FOREIGN TRADE ZONES.

[illegible] of proposed regulations pertaining to establishment and [illegible]tion of foreign trade zones in ports of entry.—The [illegible] created by the Act of June 18, 1934, 40 Stat. 998, [illegible]ing the establishment, operation, and maintenance [illegible] trade zones in ports of entry of the United States, [illegible]ver to extend by regulation the statutory provisions [illegible] penalties for violations of the act and regulations [illegible]nder. 227.

[illegible]rd is without authority to revoke grants made [illegible]lishing and maintaining trade zones because [illegible] willful violations of its regulations but may [illegible]s only for such violations of the act itself.

FORMER MORAL TURPITUDE. *See* Immigration, [illegible]

[illegible] *See* Lands, 3.

[illegible]RKS. *See* Taxation, 7.

[illegible]SERVATIONS IN HAWAII. *See* [illegible]

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GERMANY.

ARTICLES IMPORTED UPON WHICH COUNTERVAILING DUTIES ARE IMPOSED. *See* CUSTOMS LAWS, 1, 2.

SETTLEMENT OF WAR CLAIMS ACT. *See* ADMINISTRATIVE EXPENSES.

GOLD RESERVE ACT.

SILVER CERTIFICATES IN LIEU OF SILVER DOLLARS. *See* SILVER CERTIFICATES, 1.

GOVERNMENT AGENCIES.

COMPILATION OF DOCUMENTS TO BE FILED WITH NATIONAL ARCHIVES ESTABLISHMENT. *See* FEDERAL REGISTER ACT, 3.

GOVERNMENT EMPLOYEES. *See* FEDERAL EMPLOYEES.

GOVERNMENT-OWNED PATENTS. *See* LICENSES.

GOVERNMENT PRINTING OFFICE.

ISSUANCE OF FEDERAL REGISTER. *See* FEDERAL REGISTER ACT, 1.

GRAND LAKE-BIG THOMPSON TRANSMOUNTAIN DIVERSION PROJECT. *See* RECLAMATION PROJECTS, 2.

GRANTS TO STATES.

EMERGENCY RELIEF FUNDS. *See* EMERGENCY RELIEF.

GRAZING LANDS.

1. **Inclusion of certain lands in grazing districts without restriction as to acreage.—The Taylor Grazing Act** (48 Stat. 1269) **is ambiguous as to the scope of the acreage limitation imposed** upon the creation of grazing districts therein provided for, and the legislative history of the Act must be considered in determining the meaning of such limitation. 350.
2. **Same.—The Act does not authorize the inclusion in grazing districts of more than 80,000,000 acres of the lands withdrawn by Executive Order** No. 6910 of November 26, 1934. 350.

GREAT BRITAIN.

SEIZURE OF LEAD, CLAIM OF AMERICAN SMELTING AND REFINING CO. *See* CLAIMS, 1.

STATUS AS "RECIPROCAL COUNTRY" UNDER MINERAL LEASING ACT. *See* MINING LAWS, 2.

GUFFEY COAL ACT. *See* SHIPPING, 1.

HARRISON NARCOTIC ACT.

OFFENSES, PUERTO RICO. *See* COMPROMISE, 6, 7.

HAWAII.

1. **Taxation of motor-vehicle fuels sold on Federal reservations in Territory of Hawaii.—Section 10 of the Act of June 16, 1936,** 49 Stat. 1521, permits the Territory of Hawaii to levy taxes on motor-vehicle fuels sold, as provided therein upon United States military or other reservations when such fuels are not

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HAWAII—Continued.

for the exclusive use of the United States. The officers in charge of Federal reservations are required merely to report the amount of motor-vehicle fuels sold otherwise than for exclusive use of the United States. 519.

2. **Same.—It lies with the territorial government and its appropriate officers to construe its laws and determine whether taxes are to be levied** upon sales not for the exclusive use of the United States. Questions respecting the legality of taxes so levied would concern the Territorial government and those subjected to the tax, and would not arise in the administration of the War Department. 519.

3. **Same.—An officer of the War Department chargeable with collecting the taxes and paying them over to the territorial government acts on behalf of the Territory under authority from the Congress.**—Such officer is not authorized to review the acts of other public officers whose duty it is to levy the taxes and for that purpose to interpret the laws; on the contrary, he should consult them if in doubt respecting the levy, collection, or payment of the taxes on sales of motor-vehicle fuels within the Federal reservations. 519.

HAYDEN-CARTWRIGHT ACT. *See* TAXATION, 7.

HEALTH SERVICE.

RURAL AREAS. *See* PUBLIC HEALTH SERVICE, 1, 2.

HIGHWAYS.

1. **Abandonment of highway.—The Administrator of Veterans' Affairs is without authority to consent for the United States to the abandonment of a certain highway** one section of which traverses and another of which constitutes a portion of the boundary of the Veterans' Administration Facility at Bath, Steuben County, New York; and, under the circumstances, it would seem that only the Congress can legally give such consent. 474.

2. **Construction of highway and park way between Shenandoah and Great Smoky Mountains National Parks.**—The construction of the proposed highway and park way connecting the Shenandoah and Great Smoky Mountains National Parks is authorized under Title II of the National Industrial Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935; and under these statutes and Executive order of June 7, 1935, the National Parks Service of the Interior Department is authorized to perform the work as heretofore designated by the Public Works Administration with the approval of the President. 223.

HOME OWNER'S LOAN CORPORATION.

DUPLICATES OF BONDS LOST OR DESTROYED. *See* BONDS, 3-7.

GUARANTY OF BONDS BY UNITED STATES. *See* BONDS, 1, 2.

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IMMIGRATION.

1. **Exclusion of immigrants for offences involving moral turpitude.—Forgery involves moral turpitude and aliens who admit having committed acts of forgery in connection with applications for passports or visas** if such acts are prohibited by our passport and immigration laws, **are excluded from admission into the United States** under Section 5 of the Immigration Act of February 5, 1917. 128.
2. **Same.**—In the various cases submitted the stated acts of the immigrant involve forgery, although in one case the facts stated do not show that the immigrant has admitted the forgery. 128.

IMMIGRATION AND NATURALIZATION COMMISSIONER.

Appointment of commissioner.—The Commissioner of Immigration and Naturalization is an officer of the United States, and since the method of his appointment is not prescribed by statute, he may be appointed by the President with the advice and consent of the Senate. 566.

IMPORTATION.

ARTICLES FROM GERMANY. *See* CUSTOMS LAWS, 1, 2.

INDIAN LANDS.

1. **Applicability of act of June 20, 1936, to members of Osage Tribe of Indians in Oklahoma.—The Act of June 20, 1935,** providing certain forms of relief for restricted Indians whose lands have been taxed or lost by nonpayment of taxes, **is applicable to members of the Osage Tribe of Indians in Oklahoma in the same manner and to the same extent that it is applicable to members of other Indian Tribes.** 577.
2. **Construction of the act of June 18, 1934, relating to Indian lands.**—Section 18 of the act of June 18, 1934, relating to Indian lands and reservations, provides in part, "This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 121.
3. **Same.**—*Held*, **the words "this Act" cannot properly be considered as designating only a part, or parts, of the Act,** and hence the third and succeeding provisos in section 3, quoted herein, will be inoperative if the vote under section 18 is against the application of the Act. 121.
4. **Same.—The function of the proviso** is to properly restrict or make clear that which has gone before; employed also as a means of introducing into a law independent legislation. 123.

INDIANS.

CONSTRUCTION OF ACT GRANTING CERTAIN RIGHT OF HOME RULE. *See* INDIAN LANDS, 2, 3.

SUBSISTENCE HOMESTEADS. *See* SUBSISTENCE HOMESTEADS, 1.

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INSURANCE.

SUBSISTENCE HOMESTEADS. *See* SUBSISTENCE HOMESTEADS, 13.

BANK DEPOSITS. *See* SECRET SERVICE, 1–3.

MORTGAGES, NATIONAL HOUSING ACT. *See*, MORTGAGES, 1–9.

INTEREST RATES.

POSTAL SAVINGS FUNDS. *See* PHILIPPINE ISLANDS, 4; POSTAL SAVINGS SYSTEM, 1–4.

INTERIOR, SECRETARY OF.

AUTHORITY TO CONSIDER CLAIM FOR DAMAGES BY CITY OF CLEVELAND. *See* CLAIMS, 5.

WITHHOLDING PATENTS FOR LIEU LANDS. *See* LANDS, 4.

INTERNAL REVENUE BUREAU.

USE OF APPROPRIATION FOR CERTAIN EMPLOYEES. *See* EMERGENCY APPROPRIATION ACT, 1935, 3, 4.

INTERNAL REVENUE COMMISSIONER.

COMPROMISE OF CLAIMS, AUTHORITY FOR. *See* COMPROMISE, 4, 5.

INTERNAL REVENUE LAWS.

FORFEITURE OF VEHICLES FOR VIOLATION OF LAWS. *See* COMPROMISE, 1, 2.

INTERNAL REVENUE STAMPS.

SALE TO MANUFACTURER OF FERMENTED LIQUOR. *See* ATTORNEY-GENERAL, 2.

INVENTIONS.

GOVERNMENT EMPLOYEES. *See* PATENTS, 1, 7.

IRRIGATION DISTRICTS.

1. **Political character in relation to revenue acts—reconsideration of prior opinion.—The answer to the question whether a particular irrigation district is a "political subdivision" within the meaning of Section 620 (3) of Title IV of the Revenue Act of 1932, as amended,** cannot be predicated upon decisions of state courts interpreting the meaning of that term as used in state constitutions or statutes, but **must be controlled by the intention of the Congress as expressed in the act itself.** 563.
2. **The opinion of the Attorney General to the Secretary of the Treasury of January 20, 1914** (30 Op. 252), holding that special assessment districts lawfully created for public purposes under the authority of the several states and authorized to exercise a portion of their respective sovereign powers are state political subdivisions within the meaning of the Revenue Act of 1913, **should not be disturbed.** 563.

ISABELA IRRIGATION SYSTEM.

FINANCING CONSTRUCTION. *See* PUERTO RICO, 8.

JAPANESE BEETLE CONTROL.

1. **Availability of certain funds for control of infestation at St. Louis, Mo.—The facts stated show that the Japanese beetle infestation in St. Louis, Mo., is a menace to the agricultural area of the Mississippi Valley** and west thereof stricken by drought. 21.

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JAPANESE BEETLE CONTROL—Continued.

2. **Same.**—*Held*, **the appropriation of $525,000,000 made by the Emergency Appropriation Act fiscal year 1935**, "to meet the emergency and necessity for relief in stricken agricultural areas" **is available for the control of such infestation.** (See Executive Order No. 6820 of August 11, 1934.) 21.

JUDICIAL DECISIONS.

FINAL DECISIONS NOT BINDING EXCEPT IN JURISDICTION WHERE RENDERED. *See* DISBURSING OFFICERS, 2–4.

JURISDICTION.

1. **Sufficiency of Nevada statute ceding jurisdiction over Federal building site at Ely, Nevada.—The Act of March 28, 1935**, of the legislature of the State of Nevada, ceding jurisdiction to the United States over land purchased by it in Nevada, is **insufficient to meet the requirements of section 355 of the Revised Statutes respecting expenditure of public money thereon the jurisdiction ceded not being exclusive** because expressly conditioned on reservations imposing State taxation, labor safety, and health laws. 341.
2. **Same.—The United States holds as an ordinary purchaser land acquired without consent or cession of jurisdiction by the State wherein it is situate** and it is subject to the legislative authority of such State unless used as a means to carry out the purposes of the Federal Government. 341.
3. **Same.—To transfer the exclusive political jurisdiction and dominion** contemplated by article I, section 8, clause 17 of the Constitution **over land acquired by the Federal Government the State in which it is situate must either consent to the acquisition or legislatively cede such jurisdiction.** 341.
4. **Same.—Acceptance by the Federal Government of cession of political jurisdiction and dominion over land situate in a State, in the absence of dissent is presumed from the benefit conferred.** 341.
5. **Same.—The "consent" of the State required by Section 355 of the Revised Statutes of the United States before expenditure of public money is that contemplated by article I, section 8, clause 17 of the Constitution**, and where expressed by legislative cession of jurisdiction must be free from qualifications, conditions, or reservations inconsistent with the exercise by the Congress of exclusive legislation over the place ceded. 341
6. **Same.—When a State expressly cedes jurisdiction over the land to the United States, it may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition**, and the terms of the cession, to the extent that they may lawfully be prescribed, determine the extent of the Federal jurisdiction. 341.

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JURISDICTION—Continued.

7. **Same.—There is nothing incompatible with the exclusive jurisdiction** contemplated by article I, section 8, clause 17 of the Constitution **in the reservation by a State of the right to serve its processes on land in it owned by the Federal Government.** 341.

8. **Same.—While State laws regulating private civil rights may continue** in force, consistently with exclusive Federal jurisdiction, as laws of the United States on lands ceded to it by State consent so far as not in conflict with Federal laws and the purposes of the acquisition, **express reservation in the State act of cession of jurisdiction, present and future, over specified subjects is inconsistent with exclusive Federal jurisdiction.** 341.

ADJUDICATION OF CLAIMS FOR LOST PROPERTY. *See* ARMY, 3, 4.

SECRET SERVICE, TREASURY DEPARTMENT. *See* SECRET SERVICE, 1–3.

UNITED STATES OVER NAVAL AIR STATIONS. *See* NAVY, 3, 4.

JUSTICE DEPARTMENT.

COMPROMISE CASES. *See* COMPROMISE, 9, 10, 12.

KRONPRINZESSIN CECILIE.

SEIZURE OF CARGO. *See* CLAIMS, 1.

LABORERS.

MEMBERS OF CREW OF DREDGE WORKERS. *See* EIGHT-HOUR LAW.

WAGE RATES, LABORERS AND MECHANICS ON GOVERNMENT VESSELS. *See* SHIPPING, 1.

WAGES, ALLEY PROJECTS, DISTRICT OF COLUMBIA. *See* DISTRICT OF COLUMBIA, 1, 2.

LANDS.

1. **Dedication for use as parks, playgrounds, or streets.—In connection with the carrying out of low-cost housing and slum-clearance projects** the Government **may,** if it is deemed necessary or advantageous to the project, **dedicate land to the city or other public body for use as a park or playground or as a street** provided that the function of any land dedicated for use as parks or playgrounds is incidental to the contemplated low-cost housing or slum-clearance projects and reasonably necessary to provide therefor proper light, air, approaches, etc., as distinguished from monumental, landscaping, scenic, or similar functions. 273.

2. **Same.**—The reasoning of the opinion to the Secretary of the Interior of September 10, 1934, in which it was held that the Government may dedicate land for roads, streets, walks, parks, and parkways in connection with subsistence homestead projects, is applicable here. 273.

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LANDS—Continued.

3. **Validity of Executive order authorizing the Secretary of Agriculture to acquire land for wildlife conservation purposes.**—A proposed Executive Order authorizing the Secretary of Agriculture, with funds allocated to him under Title V of the Act of June 15, 1935, (49 Stat. 383) to acquire real property or any interest therein by purchase, condemnation, or otherwise as he may deem necessary and advisable, for game bird and animal refuges and for migratory bird sanctuaries and refuges, is authorized under the said Title V and the Emergency Relief Appropriation Act of 1935. 445.

4. **Withholding the issuance of patents to the Northern Pacific Railway Company for certain lands.**—The Act of June 25, 1929, chapter 41 (46 Stat. 41) requires the Secretary of the Interior to withhold the issuance of patents to the Northern Pacific Railway Co. for lands selected by it in lieu of lands within Mount Rainier National Park pending termination of the litigation authorized and directed by this act. 44.

See also Indian lands, 1; Subsistence homesteads, 3, 4, 6.

LEASES.

SUBSISTENCE HOMESTEADERS, LEASES OF LAND TO TEACHERS, ETC. *See* SUBSISTENCE HOMESTEADS, 4.

LEAVE OF ABSENCE.

1. **Canal Zone.—Validity of the provision in the Executive order of January 15 1917.**—Even assuming that the statute involved herein is ambiguous, the circumstances require the application of the principle that the administrative construction of an Act of Congress is entitled to the highest respect and, if acted upon for a number of years, should not be disturbed except for very cogent reasons. 300.

2. **Same.—The regulation contained in paragraph 36 of the Executive order of January 15, 1917, providing for cash payments in commutation of accrued leave upon termination of the service of employees in the Panama Canal service represents a valid exercise of authority vested in the President.** 300.

LEGISLATIVE EXECUTIVE AND JUDICIAL APPROPRIATION ACT, 1914.

DISTRIBUTION OF BOOKS INTERPRETATION OF ACT. *See* BOOKS FOR THE BLIND, 1, 2.

LICENSES.

License to private corporations under Government-owned patent to manufacture and sell life-line projectiles.—The Secretary of the Treasury is authorized to grant a revocable nonexclusive. and nontransferable license to a private corporation to manufacture and sell a life-line projectile covered by a Government-owned patent, either upon an expressly stated consideration or upon a determination that the issuance of the license would further a public interest. 534.

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LICENSES—Continued.

CONSTRUCTION OF GAS PIPE LINE. *See* PIPE LINES.

DISCLOSURE OF INFORMATION GIVEN BY LICENSED MILK DISTRIBUTORS. *See* CONFIDENTIAL INFORMATION.

ISSUANCE UNDER GOVERNMENT PATENTS. *See* PATENTS, 2, 3.

LIEU LANDS.

NORTHERN PACIFIC RAILWAY CO. *See* LANDS, 4.

LIFE-LINE PROJECTILES. *See* LICENSES.

LIQUORS.

SALE OF INTERNAL REVENUE STAMPS TO MANUFACTURER TO EVIDENCE TAX PAYMENT. *See* ATTORNEY-GENERAL, 2.

LOAD LINE OF VESSELS.

Authority of the Secretary of Commerce to establish load lines under the Coastwise Load Line Act, 1935.—It would seem that the Coastwise Load Line Act, 1935, does not authorize the Secretary of Commerce to establish load lines determined by the factor of stability of a vessel in a damaged condition, but limits him to establishing load lines based upon a vessel in an intact condition. 413.

LOANS.

1. **Authority of Reconstruction Finance Corporation to make loans to railroads maturing after January 31, 1945.—Under section 5 of the Reconstruction Finance Corporation Act** (47 Stat. 5) **as amended by** section 4 (a) of the Act of January 31, 1935, Public No. 1, 74th Congress, **the Reconstruction Finance Corporation may make loans to railroads maturing after January 31, 1945.** 314.
2. **Authority of Secretary of Agriculture to borrow money from the Reconstruction Finance Corporation and advance it to the manager of the 1933 Cotton Producers Pool.**—The Secretary of Agriculture is authorized by sections 4 (a) and 5 of the Agricultural Adjustment Act, as amended, to borrow the sum of $20,000,000 from the Reconstruction Finance Corporation, and by section 4 (e) of the Act to advance it to the Manager of the 1933 Cotton Producers Pool for the purpose of enabling him to make an additional distribution or loan of two cents a pound on the cotton in the pool to the pool members. 83.

COOPERATIVES OF SUBSISTENCE HOMESTEADERS. *See* SUBSISTENCE HOMESTEADS, 4.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION. *See* SUBSISTENCE HOMESTEADS, 18.

RECONSTRUCTION FINANCE CORPORATION. *See* LOANS, 1.

REFINANCING INDEBTEDNESS ON COTTON. *See* COTTON, 1, 2.

LOW-COST HOUSING PROJECTS. *See* LANDS, 1; NATIONAL HOUSING ACT, 11.

McKELLAR AMENDMENT. *See* EMERGENCY APPROPRIATION ACT, 1935, 1, 2, 5.

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MARKETABLE TITLE.

INSURED MORTGAGES. *See* MORTGAGES, 9.

MATTRESSES.

COTTON, CONTRACT FOR REMAKING. *See* CONTRACTS, 4.

MECHANICS.

MEMBERS OF CREW OF DREDGE WORKERS. *See* EIGHT-HOUR LAW.

WAGES, ALLEY PROJECTS, DISTRICT OF COLUMBIA. *See* DISTRICT OF COLUMBIA.

MERCHANT MARINE ACT, 1920.

AUTHORIZING DISPOSITION OF SURPLUS REAL PROPERTY. *See* REAL PROPERTY, 2.

MILITARY BOARD OF INQUIRY.

CAUSE OF DEATH OF NON-COMMISSIONED OFFICER. *See* ARMY, 5, 6.

MILITARY PREFERENCE.

1. **Rating required for military preference when reductions in force are made.**—An employee in the field service of the Department of Agriculture must receive a minimum efficiency rating of 80 to be entitled to a rating of "good" for military-preference purposes when reductions in force are made. 79.
2. **Same.—Competing employees.**—A junior veterinarian assigned to Chicago, Ill., station of the Bureau of Animal Industry is to be considered as in competition only with other employees at that station. 79.

MINERAL LEASING ACT. *See* MINING LAWS, 2.

MINERAL RESOURCES. *See* MINING LAWS, 1.

MINISTERIAL OFFICERS. *See* DISBURSING OFFICERS, 1.

MINING LAWS.

1. **Application to lands within the Wichita Forest Reserve.**—Lands within the areas added to the Wichita Forest Reserve after the date of the proclamation creating the Wichita National Game Reserve in the Forest Reserve are as to their mineral resources subject to entry, location, and development under the United States mining laws. 192.
2. **Status of Great Britain as a reciprocal country under the Mineral Leasing Act of February 25, 1920.—Great Britain is to be regarded as a reciprocal country** under the provisions of the Mineral Leasing Act of February 25, 1920, conditioned upon the assumptions herein stated concerning the applicable British statutes and regulations. 476.

MISSISSIPPI VALLEY.

AGRICULTURAL AREA MENACED BY JAPANESE BEETLE. *See* JAPANESE BEETLE CONTROL, 1.

MIXED CLAIMS COMMISSION.

PAYMENT OF AWARDS. *See* ADMINISTRATIVE EXPENSES.

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MONEYS.

DEPOSITORIES FOR PUBLIC MONEY OF UNITED STATES IN PHILIPPINE ISLANDS. *See* PHILIPPINE ISLANDS, 4.

ISSUANCE OF SILVER CERTIFICATES IN LIEU OF SILVER DOLLARS. *See* SILVER CERTIFICATES, 1.

PAID FEDERAL SUBSISTENCE HOMESTEADS CORPORATION. *See* SUBSISTENCE HOMESTEADS, 5.

MORAL TURPITUDE.

OFFENSES INVOLVING, IMMIGRATION LAWS. *See* IMMIGRATION 1, 2.

MORTGAGES.

1. **Insurance of certain class of mortgages under the National Housing Act.**—Mortgages on real estate, with the usual and customary provisions for protecting the proceeds of bonds sold for construction, may lawfully be insured by the Federal Housing Administrator under section 207 of the National Housing Act as amended by the Act of May 28, 1935, prior to completion of the construction projects. 332.
2. **Insurance under the National Housing Act in Adjustment of loss.**—A loss occurring prior to the termination of a contract of insurance under section 205 (c) and (d) of the National Housing Act of which the Federal Housing Administrator is given due and timely notice, followed by foreclosure of the mortgage and conveyance of title to the Administrator, is to be adjusted in like manner as though the contract had not expired. 367.
3. **Same.**—The amount required to support debentures issuable in payment of such a loss is to be deducted when ascertaining the distributable "credit balance" under the said section. 367.
4. **Same.**—Mortgages under which foreclosure proceedings have been commenced or as to which the right to foreclose has accrued and is duly prosecuted, with timely notice to the Administrator, are to be treated as though already foreclosed and hence not "outstanding." 367.
5. **Same.**—A mortgage is to be regarded as in good standing under section 205 (c) if the Administrator is without notice of a default or if the mortgagee has waived his right under the insurance contract with respect to a known default. 367.
6. **Same.**—A proposed requirement by regulation and by contract that the mortgagee keep the mortgaged premises insured against fire and other hazard if the mortgagor fails to do so is reasonable—perhaps even is implied in the terms of the statute. 367.
7. **Same.**—There is no requirement that the mortgagee replace or repair a destroyed or damaged building before conveying the property to the Administrator, under the provisions of section 204 (a), but there is an implied requirement that the mortgagee must act prudently in all the circumstances. 367.

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MORTGAGES—Continued.

8. **Same.**—"The value of the mortgage on the date of the delivery of the property to the Administrator," for the purpose of issuing debentures in payment of insurance under section 204 (a), is the whole amount of the principal actually unpaid by the mortgagor. 367.

9. **Same.**—The Administrator is authorized to provide by regulation and by contract that a "marketable title" will be satisfactory under section 204 (a) and that the title approved by the Administrator and determined to be a marketable one at the time the insurance is written will be accepted as satisfactory in the adjustment of any claims for the insurance benefits if unimpaired by any act or omission of the mortgagee or other event occurring subsequent to the date the mortgage was accepted for insurance. 367.

10. **Same.**—The Administrator may provide by regulation that there shall be included as "taxes" under section 204 (a) of the Act such assessments and water rates as have been paid by the mortgagee, and are recognized as taxes under the local law and by operation thereof are prior liens upon the mortgaged property. 367.

INSURANCE. *See* NATIONAL HOUSING ACT, 2, 9.

MOTOR CARRIER ACT 1935. *See* TRANSPORTATION RATES, 1, 2.

MOTOR-VEHICLE FUELS SOLD IN NATIONAL PARKS, STATE TAXATION. *See* TAXATION, 7.

MOTOR-VEHICLE FUELS SOLD ON FEDERAL RESERVATIONS IN HAWAII, TAXATION. *See* Taxation, 4.

MOTOR VEHICLES.

RATES FOR GOVERNMENT UNDER MOTOR CARRIER ACT. *See* TRANSPORTATION RATES, 1, 2.

MOUNT RAINIER NATIONAL PARK.

PATENTS FOR LIEU LANDS. *See* LANDS, 4.

NARCOTIC FARMS.

Transfer of drug addicts to narcotic farms upon conviction of crime.—The act of January 19, 1929, 45 Stat. 1086, does not require that narcotic addicts convicted of offenses against the United States shall be confined in a penal institution as a condition precedent to their being sent to the Public Health Service Hospital at Lexington, Kentucky, but such addicts may be transferred directly from the convicting courts to the hospital. 541.

NATIONAL ARCHIVES.

1. **Administration of Federal Register Act.**—Documents required or authorized to be published under section 5 of the Federal Register Act are, with the exceptions noted, valid and operate as constructive notice to the persons designated as soon as they are filed with the Division of the Federal Register and

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NATIONAL ARCHIVES—Continued.

made available for public inspection as provided in section 2 of the Act; and publication in the Federal Register is not essential to the validity of such documents. 359.

2. **Same.**—The provisions of section 7 of the Act respecting validity and constructive notice do not apply to the compilation of documents referred to in section 11. 359.
3. **Federal Register Division.—Necessity for confirmation of appointment of Director.**—The appointment provisions of section 1 of the Federal Register Act and section 2 of the Act of July 19, 1934, establishing the National Archives are not in conflict or inconsistent with each other. 250.
4. **Same.—Salary of director.**—If the salary of the director of the division set up in the National Archives Establishment for carrying out the purposes of the Federal Register Act is fixed at less than $5,000 a year, his appointment need not be confirmed by the Senate; but if fixed at $5,000 a year confirmation by the Senate is required. 250.
5. **Maintenance of the National Archives Building.**—General statutory provisions and the Executive Order of June 10, 1933, would vest the responsibility for operation and maintenance of the Archives Building in the office of National Buildings, Parks, and Reservations, whereas the act of June 19, 1934, ch. 668, 48 Stat. 1122, authorizes future appropriations for the maintenance of the Archives Building to be expended under the direction of the Archivist of the United States and indicates an apparent purpose to preserve the authority of the office of National Buildings, Parks, and Reservations, an inconsistency thus being created. 141.
6. **Same.**—The President is advised to recommend to Congress that the appropriation, when made, for the operation and maintenance of the Archives Building be so worded as to show conclusively whether the responsibility for such operation and maintenance is vested in the office of National Buildings, Parks, and Reservations or in the Archivist of the United States. 141.

DOCUMENTS TO BE FILED WITH DIRECTOR OF FEDERAL REGISTER DIVISION. *See* FEDERAL REGISTER ACT, 2.

NATIONAL ARCHIVES ESTABLISHMENT.

FUNDS FOR PAYMENT OF DIRECTOR OF FEDERAL REGISTER. *See* FEDERAL REGISTER ACT, 4.

GOVERNMENT AGENCIES, PREPARATION AND FILING OF COMPILATION OF DOCUMENTS. *See* FEDERAL REGISTER ACT, 3.

NATIONAL BUILDINGS, PARKS, AND RESERVATIONS.

RESPONSIBILITY FOR MAINTENANCE AND OPERATION OF ARCHIVES BUILDING. *See* NATIONAL ARCHIVES, 5, 6.

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NATIONAL DEFENSE.

INTERCHANGE OF PROPERTY BETWEEN ARMY AND NAVY. *See* PROPERTY, 2, 5.

NATIONAL FORESTS.

Authority to make additions to Carson National Forest in New Mexico.—The prohibition contained in section 471, Title 16. U. S. C., against creating or making additions to forest reservations in the States of New Mexico and Arizona, except by act of Congress, is applicable as to lands purchased by the Federal Emergency Relief Administration, as an agency of the Public Works Administration, under authority of Title II of the National Industrial Recovery Act; and such lands may not be added to the Carson National Forest in New Mexico, except by act of Congress. 204.

NATIONAL HOUSING ACT.

1. **Constitutionality of certain provisions of the National Housing Act.**—The Congress may not only protect and aid the specific national activities over which it has been delegated authority by the Constitution but it may also provide adequate protection and aid for agencies created by it to exercise Federal powers. 258.
2. **Same.**—Mortgage associations.—The Congress has exercised such powers in providing in the National Housing Act for the insurance of mortgages and the creation of national mortgage associations to deal in such mortgages. 258.
3. **Same.**—The statutory provisions for the national mortgage associations are further justified in view of their designation as depositaries of public money and as financial agents of the Government, and the requirement that they maintain certain investments in bonds or obligations issued or guaranteed by the United States. 258.
4. **Same.**—The issuance of the certificate of approval by the Administrator to incorporators transmitting articles of association in the form submitted is effective to create a valid national mortgage association under title III of the act as amended. 258.
5. **Same.**—Welfare clause.—The general-welfare clause of the Constitution empowers the Congress to spend moneys for the general welfare and there is no limitation which requires such expenditures to be in the exercise of, or connected with, other enumerated powers. 258.
6. **Same.**—The purposes of the National Housing Act are for the welfare of the Nation as a whole. 258.
7. **Same.**—Guaranty of debentures.—The power of the Congress to borrow money on the credit of the United States authorizes a guarantee by the United States of obligations incurred by its agencies in the borrowing of money. 258.

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NATIONAL HOUSING ACT—Continued.

8. **Same.—The insurance and guarantees provided for in the National Housing Act are within the constitutional grants of power to appropriate for the general welfare and to borrow money on the credit of the United States.** 258.
9. **Same.—The insuring of a mortgage under title II of the National Housing Act, as amended, and the regulations issued thereunder, creates a valid obligation on the part of the Federal Housing Administrator to issue the debentures therein provided for,** and the debentures so issued are valid obligations enforcible against the mutual mortgage insurance fund. 258.
10. **Same.—The guarantee by the United States of such debentures, in accordance with the provisions of section 204 of the act, as amended, constitutes a valid and binding obligation of the United States.** 258.
11. **Sale of low-cost housing or slum-clearance projects.—The Federal Emergency Administrator of Public Works is without authority,** in view of Section 4 (a) of the Act of June 29, 1936, 49 Stat. 2026, **to sell certain slum-clearance or low-cost housing projects in New York City** upon a proposed basis of 55 percent or more, of cost plus interest. 543.

DEBENTURES OF FEDERAL HOUSING ADMINISTRATION GUARANTEED. *See* DEBENTURES, 1.

INSURANCE OF MORTGAGES ON REAL ESTATE. *See* MORTGAGES, 1.

RIGHTS OF MORTGAGEES UNDER INSURED MORTGAGES. *See* MORTGAGES.

NATIONAL INDUSTRIAL RECOVERY ACT.

ADDITIONS TO CARSON NATIONAL FOREST, N. MEX. *See* NATIONAL FORESTS.

CONSTRUCTION OF THOMAS JEFFERSON MEMORIAL. *See* THOMAS JEFFERSON TERRITORIAL EXPANSION MEMORIAL, 2.

FUNDS FOR CONSTRUCTION OF SUBSISTENCE HOMESTEADS. *See* SUBSISTENCE HOMESTEADS, 7.

HIGHWAY CONSTRUCTION BETWEEN CERTAIN NATIONAL PARKS. *See* HIGHWAYS, 2.

LABOR WAGE RATES ON ALLEY PROJECTS, DISTRICT OF COLUMBIA. *See* DISTRICT OF COLUMBIA, 1, 2.

SALE OF PROPERTY FOR LOW-COST HOUSING. *See* NATIONAL HOUSING ACT, 11.

SUBSISTENCE HOMESTEADS FOR INDIANS. *See* SUBSISTENCE HOMESTEADS, 1.

NATIONAL MORTGAGE ASSOCIATION. *See* NATIONAL HOUSING ACT, 2–4.

NATIONAL PARK SERVICE.

AUTHORITY TO CONSTRUCT HIGHWAY BETWEEN CERTAIN NATIONAL PARKS. *See* HIGHWAYS, 2.

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NATIONAL PARKS.

ROCKY MOUNTAIN NATIONAL PARK. *See* RECLAMATION PROJECTS, 2, 3.

STATE TAXATION OF MOTOR-VEHICLE FUELS SOLD IN. *See* TAXATION, 7.

NATURALIZATION.

EFFECT OF NATURALIZATION OF PARENTS UPON FOREIGN-BORN AND ADOPTED CHILDREN. *See* CITIZENSHIP, 1–7, 10.

NAVAL AIR STATIONS. *See* NAVY, 3.

NAVAL AMMUNITION DEPOT. *See* NAVY, 4.

NAVAL OFFICERS. *See* NAVY, 5–7.

NAVY.

1. **Construction of naval vessels.—Joint bid of parent and subsidiary companies.**—The United Shipbuilding and Dry Dock Corporation is a wholly-owned subsidiary of United Dry Docks, Inc., and the officers and directors of the two firms are the same persons. The former submits a bid, in response to Navy Department advertisements, for the construction of two vessels, and it is accepted. Accompanying the bid is a copy of an agreement between the two companies providing that if the subsidiary is awarded the contract on its bid, the parent company will furnish the shipyards, equipment, and labor and the subsidiary the material for performance of the contract. The agreement also shows that the two companies intend to share the profits of the contract and be responsible for its performance. 91.
2. **Same.**—*Held*, **the bid submitted may be considered as the joint bid of the companies**, and, upon proper amendment of the award, they may be made jointly and severally parties to the formal contract. 91.
3. **Naval air stations.—Jurisdicton of the United States over the sites at Lakehurst and Cape May, N. J.—The sites of the Naval Air Stations** at Lakehurst and Cape May, N. J., **were acquired by the United States with the consent of the State of New Jersey**; and the United States has thus acquired exclusive jurisdiction over such sites as provided in Article I, Section 8, Clause 17 of the Constitution. 185.
4. **Naval ammunition depot, Hawthorne, Nev.—Jurisdiction of United States over site.—The act of the legislature of Nevada,** approved March 28, 1935, **ceding to the United States jurisdiction over the site of the Naval Ammunition Depot at Hawthorne, Nev.,** but reserving to the State and political subdivisions thereof the right to tax private property and to serve process upon the affected premises, **is considered satisfactory to the Government and no further action by the Navy Department is required.** 216.

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NAVY—Continued.

5. **Officers.—Permanent change of Station.—Construction of statute.**—The Attorney General in an opinion to the Secretary of the Navy, and the Court of Claims in *Bullard* v. *United States*, 66 Ct. Cls. 264, and numerous subsequent decisions, have held that **an officer detached from duty and ordered to his home to await further orders has been ordered to make a permanent change of station within the meaning of Section 12 of the Act of May 18, 1920, 41 Stat. 604**; and under the Court of Claims decisions, which the Department of Justice has determined should not be appealed, **it is immaterial whether** the station from which the officer **is** ordered is *within* or *without* the United States. The Comptroller General has held, on the contrary, that no permanent change of station is involved in case the officer is ordered from a station *within* the United States, and he has refused to accept the Court of Claims decisions as binding upon his office in such cases. 176.

6. **Same.**—*Held*, the Secretary of the Navy should accept the **opinion of the Attorney General and the decisions of the Court of Claims as controlling** in the administration of the statute, and should instruct his subordinates accordingly. 176.

7. **Same.**—*Held, further*, **the Comptroller General is bound as a matter of law by the construction placed upon the statute by the Attorney General and the Court of Claims.** 176.

INTERCHANGE OF PRORPERTY BETWEEN ARMY AND NAVY. *See* PROPERTY, 1–5.

TRANSFER OF TITLE IN "U. S. S. MEMPHIS". *See* SHIPPING, 6.

NAVY DEPARTMENT.

INTERCHANGE OF PROPERTY BETWEEN ARMY AND NAVY. *See* PROPERTY, 1–5.

NAVY, SECRETARY OF.

ADMINISTRATION OF STATUTE RELATING TO PERMANENT CHANGE OF STATION OF NAVAL OFFICERS. *See* NAVY, 6.

NEVADA.

STATUTE CEDING JURISDICTION OVER BUILDING SITE PURCHASED BY UNITED STATES. *See* JURISDICTION, 1–8.

NORTHERN PACIFIC LAND GRANTS.

PATENTS FOR LIEU LANDS. *See* LANDS, 4.

NOTICE.

DOCUEMNTS PUBLISHED IN FEDERAL REGISTER TO OPERATE AS CONSTRUCTIVE NOTICE. *See* NATIONAL ARCHIVES, 1, 2.

OCEAN MAIL SERVICE.

1. **Authority of the Postmaster General with respect to certain contract for ocean-mail service.—The Postmaster General is not required to cancel the contract of June 9 1928 between** the United States and the Munson Steamship Line, Inc., for ocean-mail service between New York and Buenos Aires **because of the failure of the contractor to provide and operate**

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OCEAN MAIL SERVICE—Continued.

vessels in accordance with the contract but he may accept the service rendered and make suitable deductions from the amounts otherwise due and payable under the contract. 282.

2. **Same.**—The question whether the test made to determine whether the vessel met the contract requirements is a question of fact which the Postmaster General must administratively determine, and upon which the right to make the above-mentioned deductions depends. 282.

OFFICE OF HONOR, TRUST, OR PROFIT UNDER GOVERNMENT.

STATUTORY DISQUALIFICATIONS. *See* ARMY, 7, 8.

OFFICER OF THE UNITED STATES.

COMMISSIONER OF IMMIGRATION AND NATURALIZATION, APPOINTMENT. *See* IMMIGRATION AND NATURALIZATION COMMISSIONER.

OFFICERS. *See* ARMY, 5–8; DISBURSING OFFICERS, 1–4; NAVY, 5–7; PHILIPPINE ISLANDS, 5.

OPTIONS ON LAND.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION. *See* SUBSISTENCE HOMESTEADS, 14.

OSAGE INDIANS, OKLAHOMA.

APPLICATION OF RELIEF ACT FOR PAYMENT OF TAXES, ETC., ON RESTRICTED LANDS. *See* INDIAN LANDS, 1.

PANAMA CANAL ZONE.

LEAVE OF ABSENCE. *See* LEAVE OF ABSENCE, 1, 2.

PAPAGO TRIBE OF INDIANS.

EFFECT OF VOTE TO REJECT AN ACT OF CONGRESS RELATIVE TO LANDS AND RESERVATIONS. *See* INDIAN LANDS, 2, 3.

PARKS.

DEDICATION OF LAND, PARKS, ETC. *See* LANDS, 1.

PATENTS.

1. **Inventions of Government Employees assigned to the Government.—Right of United States to exclusive use.**—When an invention is made by a Government employee under such circumstances that the invention is the property of the United States, it is customary procedure to have the patent covering the invention issue to the United States, as represented by a designated officer, upon assignment executed by the employee, either before or after the application is filed. 425.

2. **Same.**—It is an established practice for the United States to acquire and hold patents and licenses under Government patents have heretofore been issued to private persons. The issuance of such licenses is consistent only with the view that there is no authority for private persons to use inventions covered by government-owned patents in the absence of license. 425.

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PATENTS—Continued.

3. **Same.**—If a proper case warranting such action should arise, the Government ought to undertake to maintain in the courts the exclusive right of the United States, under a duly acquired patent. 425.

4. **Issuance to Government employees.**—In order that an application for a patent may be received and a patent granted, without payment of fees, under the Act of March 3, 1883, c. 143, 22 Stat. 603, as amended by the Act of April 30, 1928, c. 640, 45 Stat. 467, the invention covered by the application must have been made by an "officer, enlisted man, or employee of the Government, except officers and employees of the Patent Office." 402.

5. **Same.**—Each applicant for a patent must be in the service of the United States and within one of the classes prescribed by the statute at the time the application for a patent is filed, or the right to file an application accrues in cases covered by proper contracts. 402.

6. **Same.—Fees.**—The statutory waiver of fees is not affected by the fact that the applicant for a patent after filing his application in due compliance with the statute, dies or leaves the service of the Government before the patent is actually granted. 402.

7. **Same.**—The statute contemplates and authorizes an agreement by the inventor, while in the service of the United States, that the invention may be manufactured and used by or for the Government, if patented, without payment of royalty, and the consideration therefor is the right to file and prosecute an application for a patent without payment of fees. 402.

8. **Same.**—Such an agreement may be carried out and the inventor permitted to file and prosecute an application for a patent without payment of fees, notwithstanding that his services with the Government may be discontinued prior to the actual filing of the application. 402.

9. **Same.**—Neither the letter nor the spirit of the law warrants any distinction based upon permanent or temporary status, or duration of service, so long as the individual is actually in the service of the United States when the invention is made and the necessary steps are taken to insure the application of the statute. 402.

10. **Same.**—Eligibility under the statute is dependent upon service as an existing fact, and not upon past service or possible future service. 402.

REVOCABLE LICENSES, GRANT UNDER GOVERNMENT-OWNED PATENTS. *See* LICENSES.

PATENTS TO LAND.

NORTHERN PACIFIC RAILWAY CO. *See* LANDS, 4.

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PENAL INSTITUTIONS.

TRANSFER OF DRUG ADDICTS TO NARCOTIC FARMS. *See* NARCOTIC FARMS.

PENSIONS. *See* WORLD WAR VETERANS' ACT.

PERSHING HALL.

Expenditure of appropriation for settlement of indebtedness against Pershing Hall.—An assurance or commitment of the American Legion, Inc., to the effect that it will assume the duties of maintaining and perpetuating Pershing Hall, Paris, France, is not a condition precedent to the expenditure of the funds appropriated by the Act of August 12, 1935, c. 508, 49 Stat. 571, for the settlement of the indebtedness against the said Hall. 459.

PERSONAL PROPERTY. *See* PROPERTY, 1–5.

PHILIPPINE INDEPENDENCE ACT. *See* PHILIPPINE ISLANDS, 4.

PHILIPPINE ISLANDS.

1. **Constitution.**—The proposed constitution for the government of the Philippine Islands, as adopted by the Constitutional Convention, is in substantial conformity with the provisions of the act of March 24, 1934, 48 Stat. 456. 197.
2. **Same.**—Certain differences between the provisions of the proposed constitution and the provisions of the act discussed and held to be immaterial. 197.
3. **Designation of an acting United States High Commissioner to the Philippine Islands.**—Neither the Act of March 24, 1934, 48 Stat. 456, providing for the independence of the Philippine Islands, nor section 179 of the Revised Statutes contains any authority for a proposed Executive order providing that in the event of a vacancy in the office of the United States High Commissioner to the Philippine Islands or the temporary disability of the High Commissioner, the Legal Adviser, or in his absence, the Financial Expert, shall perform the functions of the said office. 298.
4. **Effect of the Philippine Independence Act on the provisions of the act of July 1, 1902.**—The provisions of section 85 of the Act of July 1, 1902, relating to the designation in the Philippine Islands of depositories for public money of the United States have not been repealed by section 15 of the Philippine Independence Act of March 24, 1934. 385.
5. **Election of officers for the Government of the Commonwealth of the Philippines.**—The language of section 4 of the Act of March 24, 1934, 48 Stat. 458, requiring "a proclamation for the election of officers for the Government of the Commonwealth of the Philippine Islands provided for in the constitution" does not contemplate an election of provincial and municipal officers. 235.

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PIPE LINES.

Granting of license for the construction of a gas pipe line.—The President may grant a license for the construction and maintenance of a pipe line under the Rio Grande for transportation of gas from gas fields in Texas to Monterrey, Mexico. 163.

PLAYGROUNDS, ETC.

DEDICATION OF LAND, LOW-COST HOUSING. *See* LANDS.

POLICE.

PROTECTION FOR SUBSISTENCE HOMESTEAD OCCUPANTS. *See* SUBSISTENCE HOMESTEADS, 10.

POLITICAL SUBDIVISIONS.

IRRIGATION DISTRICTS. *See* IRRIGATION DISTRICTS.

PORTS OF ENTRY.

FOREIGN TRADE ZONES, ESTABLISHMENT. *See* FOREIGN TRADE ZONES, 1, 2.

POSTAL SAVINGS ACT.

DEPOSIT OF POSTAL SAVINGS FUNDS. *See* PHILIPPINE ISLANDS, 4.

POSTAL SAVINGS SYSTEM.

1. **Effect of certain provisions of the Banking Act of 1935 on the Postal Savings Act of June 25, 1910, as amended.—The mandatory provision of section 2 of the amendment of May 18, 1916,** to the Postal Savings Act, requiring **postal savings funds to be deposited in member banks of the Federal Reserve System, provided such banks agree to pay interest at the rate of not less than 2¼% has been repealed by the Banking Act of 1935;** and the Board of Trade of the Postal Savings System is now empowered in its discretion to deposit postal savings funds in member banks of the Federal Reserve System at such rate of interest as may be fixed by the Board of Governors. 389.
2. **Same.—The uniform-interest requirement of section 2 of the amendment of May 18, 1916, must be deemed repealed by the Banking Act of 1935**; and the Board of Trustees of the Postal Savings System may, in its discretion, deposit postal savings funds in member banks of the Federal Reserve System at interest rates which vary in different localities. 389.
3. **Same.—The** said **Board of Trustees is not required to dispose of any part of its investments for the purpose of redepositing such funds in qualified banks.** 389.
4. **Same.—Section 341 of the Banking Act of 1935 supplements section 7 of the Postal Savings Act as amended,** with the result that no interest on postal savings deposits is payable in excess of the rate prescribed by the Board of Governors for payment by member banks on savings deposits; and the interest of 2% prevails except that whenever the interest rate prescribed by the Board of Governors is less than 2%, such lower rate shall be paid. 389.

POSTAL SERVICE. *See* OCEAN MAIL SERVICE, 1. 2.

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POSTMASTER GENERAL.

CONTRACT FOR OCEAN-MAIL SERVICE. *See* OCEAN MAIL SERVICE, 1, 2.

POWER PROJECT. *See* RECLAMATION PROJECTS, 1.

POWERS.

DELEGATION OF STATUTORY POWERS. *See* PUERTO RICO, 1, 2.

PRESIDENT.

ADVISED TO RECOMMEND CONGRESS AS TO WORDING OF LEGISLATION APPROPRIATING FOR MAINTENANCE OF ARCHIVES BUILDING. *See* NATIONAL ARCHIVES, 6.

APPOINTMENT OF COMMISSIONER OF IMMIGRATION AND NATURALIZATION. *See* IMMIGRATION AND NATURALIZATION COMMISSIONER.

AUTHORITY UNDER TAXING PROVISIONS OF COTTON CONTROL ACT. *See* TAXATION, 2.

CIVIL SERVICE RULE VII, AUTHORITY TO AMEND. *See* CIVIL SERVICE, 1.

CONSTRUCTION OF THOMAS JEFFERSON MEMORIAL. *See* THOMAS JEFFERSON TERRITORIAL EXPANSION MEMORIAL, 1–5.

DELEGATION OF STATUTORY POWERS. *See* PUERTO RICO, 4, 5.

DESIGNATION OF ACTING GOVERNOR OF PUERTO RICO. *See* PUERTO RICO, 3.

DESIGNATION OF ACTING UNITED STATES HIGH COMMISSIONER TO PHILIPPINE ISLANDS. *See* PHILIPPINE ISLANDS, 3.

INTERCHANGE OF PROPERTY BETWEEN ARMY AND NAVY, AUTHORITY TO ORDER. *See* PROPERTY, 1–5.

LICENSE FOR CONSTRUCTION, ETC. OF PIPE LINE. *See* PIPE LINES.

MUNICIPAL COUNCIL BILLS VETOED BY GOVERNOR OF VIRGIN ISLANDS, TO BE PRESENTED TO PRESIDENT. *See* VIRGIN ISLANDS, 4.

POWER TO AUTHORIZE A SPECIAL REEMPLOYMENT LIST FOR PENDING AGRICULTURAL CENSUS. *See* CENSUS BUREAU.

RIGHT TO DETERMINE LOSSES TO UNITED STATES EMPLOYEES IN FOREIGN EXCHANGE. *See* EXCHANGE, 2.

SILVER CERTIFICATES IN LIEU OF SILVER DOLLARS, AUTHORITY TO DIRECT ISSUE. *See* SILVER CERTIFICATES, 1.

PRICE DISCRIMINATION.

GOVERNMENT CONTRACTS FOR SUPPLIES, ANTITRUST LAWS. *See* CONTRACTS, 1.

PROJECTILES.

LIFE-LINE PROJECTILES, REVOCABLE LICENSES UNDER GOVERNMENT-OWNED PATENT. *See* LICENSES.

PROPERTY.

1. Interchange of property between the War and Navy Departments.—A proposed Executive order effecting an interchange of certain property between the War and Navy Departments,

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PROPERTY—Continued.

which interchange has been agreed to by the Acting Secretaries of the War and Navy Departments, is authorized under the following provision of the Act of July 11, 1919, 41 Stat. 131, 132:

"The interchange without compensation therefor, of military stores, supplies, and equipment of every character, including real estate owned by the Government, is hereby authorized between the Army and the Navy upon the request of the head of one service and with the approval of the head of the other service." 293.

2. **Same.—Since the proposed interchange of property is in the interest of the national defense, it is probable that the President is also authorized to issue the order as Commander-in-Chief of the Army and the Navy.** 293.
3. **Same.—Repeal by implication is not favored, and only in case** the two statutes involved are in direct conflict or clearly inconsistent with each other will a repeal be implied. 356.
4. **Same.—The provisions of the Act of July 11, 1919** (41 Stat. 131, 132), authorizing the interchange of property between the Army and Navy, **are not impliedly repealed, either partially or otherwise by the Act of March 12,1926,** providing a method for the disposition of real property no longer needed for military purposes. 356.
5. **Same.—Opinion to the President of September 26, 1935,** holding that a proposed Executive order effecting a certain interchange of property between the War and Navy Departments was authorized under the Act of July 11, 1919, *supra*, **adhered to on reconsideration.** 356.

PROPERTY. *See also* **REAL PROPERTY.**

PUBLIC CONTRACTS.

COMPLIANCE WITH STATUTORY REQUIREMENTS. *See* SHIPPING, 7.

PUBLIC HEALTH SERVICE.

1. **Promotion of health service in rural areas.**—A proposed executive order allocates to the Secretary of the Treasury from the appropriation of $899,675,000 contained in the Emergency Appropriation Act, fiscal year 1935, $1,000,000 for use in enabling the Public Health Service to cooperate with and assist local state health officers in the establishment and promotion of adequate health service in rural areas. 28.
2. **Same.**—*Held*, the proposed allocation is authorized under the said Emergency Appropriation Act for carrying out the purposes of the Federal Emergency Relief Act of 1933. 28.

PUBLIC LANDS.

ACQUIRED FOR IRRIGATION PURPOSES, SALE OF UNNEEDED. *See* STATUTES.

ESTABLISHMENT OF GRAZING DISTRICTS PERMITTED. *See* GRAZING LANDS, 1, 2.

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PUBLIC ROADS.

USE BY OCCUPANTS OF SUBSISTENCE HOMESTEADS. *See* SUBSISTENCE HOMESTEADS, 10.

PUBLIC WORKS PROJECTS.

DEDICATION OF LAND FOR PARKS, ETC. *See* LANDS, 1.

PUERTO RICO.

1. **Appointment of Regional Administrator of the Puerto Rico Reconstruction Administration.—The Chancellor of the University of Puerto Rico is granted a year's leave of absence with pay to enable him to make his services available to the Puerto Rico Reconstruction Administration established by** Executive order of March 28, 1935, as an agency within the Department of the Interior to carry out in Puerto Rico the purposes of the Emergency Relief Appropriation Act of 1935. 294.
2. **Same.**—*Held,* **the proposed appointment of the Chancellor as Regional Administrator of the Puerto Rico Reconstruction Administration without compensation is authorized by the Emergency Relief Appropriation Act of 1935;** and the prohibition of Title 5, U. S. C., sec. 66, that no Government official or employee shall in connection with his services as such be paid or receive any salary from any source other than the United States Government, except as may be contributed by any State, county, or municipality, is not applicable here. 294.
3. **Same.—Designation of Acting Governor.—The power of designating, under the Organic Act of Puerto Rico, an Acting Governor** of Puerto Rico **is properly to be exercised through the head of the department charged with the administration of Puerto Rican affairs, but in such manner that the designation will be in effect that of the President** rather than that of the head of the department. 457.
4. **Same.**—Although every reasonable presumption of validity is to be indulged with respect to the performance by the head of a department of a duty imposed upon the President, nevertheless, **the President cannot, without statutory authority, delegate a discretionary duty, relieving himself of all responsibility,** so that the performance of the duty will not be his act but wholly the act of another. 457.
5. **Delegation of statutory powers.—The power of appointment conferred by statute cannot be delegated without statutory authority.** 457.
6. **Offenses against the Harrison Narcotic Act in Puerto Rico.**—Offenses committed in Puerto Rico against the Harrison Narcotic Act may be compromised under section 3229 of the Revised Statutes. Such compromises may be made by the local authorities, and the proceeds thereof may be retained by the Puerto Rican Government. 381.
7. **Same.**—Where doubt exists as to the construction of a statute great weight is properly given to the construction given it by

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PUERTO RICO—Continued.

the Executive Department charged with its administration, and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required. 381.

8. **Validity of a proposed bond issue.**—The proposed bond issue of Puerto Rico in the amount of $75,000 for the retirement of bonds issued for financing the construction of the Isabela Irrigation System is authorized under the Acts and Executive Order cited herein; and the form of bond submitted complies with the law and the determinations of the Treasurer of Puerto Rico approved by the Governor. 158.

9. **Same.**—The proposed bond issue of Puerto Rico in the amount of $75,000 for the retirement of bonds issued for financing the construction of the Isabela Irrigation System is authorized under the Acts cited herein; and the form of bond submitted complies with the law and the determinations of the Treasurer of Puerto Rico approved by the Governor. 435.

10. **Same.**—The proposed bond issue of the Government of Puerto Rico in the amount of $120,000 for financing the extension of an irrigation system now in operation is authorized under the acts and Executive order cited herein. The form of bond submitted complies with the law and the determinations of the Treasurer of Puerto Rico approved by the Governor. 242.

11. **Same.**—The bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Puerto Rico. 242.

12. **Same.**—The proposed bond issue of Puerto Rico in the amount of $1,000,000 for the construction of insular and municipal roads is authorized under the Acts cited herein; and the form of bond submitted complies with the law and the determinations of the Treasurer of Puerto Rico approved by the Governor. 500.

13. **Same.**—The proposed bond issue of the Government of Puerto Rico of the face value of $3,778,000 for retiring seven described bond issues maturing January 1, 1936, is authorized under section 3 of the Act of March 2, 1917, 39 Stat. 951, 963, as amended, Act No. 24 of the Legislature of Puerto Rico, approved July 16, 1935, and the Act of August 3, 1935, Public, No. 236, Seventy-fourth Congress. 286.

14. **Same.**—Issuance of the proposed bonds will not cause the indebtedness of the Government of Puerto Rico to exceed the maximum amount permitted by statute, and the bonds are in accord with the determinations of the Treasurer of Puerto Rico approved by the Government. 286.

15. **Same.**—The bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Puerto Rico. 286.

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PUERTO RICO RECONSTRUCTION ADMINISTRATION.

APPOINTMENT OF REGIONAL ADMINISTRATOR. *See* PUERTO RICO, 1, 2.

RADETSKY IRON AND METAL CO.

TITLE INTEREST IN EX "U. S. S. MEMPHIS." *See* SHIPPING, 6.

RADIO TRANSMISSION EQUIPMENT.

LEGALITY OF AWARD OF CONTRACTS. *See* CONTRACTS, 2.

RAILROAD RETIREMENT ACT. *See* RETIREMENT, 1–3.

RAILROADS.

Loans, by Reconstruction Finance Corporation. *See* Loans, 1.

RATES.

TRANSPORTATION BY MOTOR VEHICLE. *See* TRANSPORTATION RATES, 1, 2.

REAL PROPERTY.

1. **Disposition of surplus real property.—Effect of Act of August 27, 1935, upon section 16 of Merchant Marine Act, 1920.—The Act of August 27, 1935,** providing for the disposition, control, and use of surplus real property acquired by federal agencies **does not supersede the authority and direction contained in Section 16 of the Merchant Marine Act, 1920,** as amended (U. S. C., Title 46, Sec. 874), respecting the disposition of properties acquired during the World War period for housing purposes. 466.

2. **Same.—Effect of act of August 27, 1935, upon certain earlier statutes and contracts made thereunder.**—The Act of August 27, 1935, c. 744, 49 Stat. 885, providing for the disposition, control, and use of surplus real property acquired by federal agencies, does not affect—

   (1) **The Act of May 28, 1935, c. 155, 49 Stat. 305, as amended** by the Act of August 27, 1935, c. 754, 49 Stat. 896, authorizing the Secretary of Commerce to convey specified parcels of land to indicated states and cities for park purposes.

   (2) **Section 16 of the Merchant Marine Act, 1920, as amended** (U. S. C., Title 46, Sec. 874), authorizing and directing the United States Shipping Board to dispose of certain properties acquired during the World War for housing employees of the United States, as applied to properties made the subject of contract with the Brooklawn Housing Corporation prior to passage of the Act of August 27, 1935. 448.

   (3) **The Act of March 4, 1913, c. 168, 37 Stat. 1017, 1019** (U. S. C., Title 33, Sec. 752), as applied to five parcels of real property which were sold, upon advertisement, to the highest bidder and for which deeds were prepared but not executed and delivered prior to passage of the Act of August 27, 1935. 448.

FEDERAL, DISPOSITION OF SURPLUS. *See* STATUTES.

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REAL ESTATE.

MORTGAGES INSURED UNDER NATIONAL HOUSING ACT. *See* MORTGAGES, 1.

RECLAMATION PROJECTS.

1. **Grand Lake-Big Thompson Transmountain Diversion Project.—Construction by Reclamation Bureau.**—The Congress has recognized the distinction between a reclamation project and a power project (Reclamation Act of June 17, 1902, and Federal Water Power Act of June 10, 1920). 310.
2. **Same.**—If the proposed Grand Lake-Big Thompson Transmountain Diversion Project is in fact a "Government reclamation project" the Bureau of Reclamation is authorized to enter upon and utilize any area within the Rocky Mountain National Park which may be necessary for the development and maintenance of such project. 310.
3. **Same.**—The authority of the Reclamation Service under the Act of January 26, 1915 (38 Stat. 798), to enter upon and utilize for flowage or other purposes any area within the Rocky Mountain National Park necessary for the development and maintenance of a Government reclamation project, is not affected by the Act of March 3, 1921 (41 Stat. 1353), limiting the power of the Federal Water Power Commission in certain respects. 310.

RECONSTRUCTION FINANCE CORPORATION.

1. **Authority to engage the legal services of a Member of Congress.—The Reconstruction Finance Corporation, the contracts and agreements of which are subject to sections 114–116 of the Criminal Code, is not authorized to engage the services, as attorney or counsel, of a Member of Congress or a firm of which a Member of Congress is a partner.** 213.
2. **Same.**—The rule *expressio unius est exclusio alterius* applied. 213.

FUNDS TO COMMODITY CREDIT CORPORATION TO RETIRE CERTAIN DEBENTURES, ETC., AUTHORITY TO LOAN. *See* DEBENTURES, 3, 4.

LOANS TO RAILROADS. *See* LOANS, 1.

MONEY LOANED SECRETARY OF AGRICULTURE FOR LOAN ON COTTON. *See* LOANS, 2.

RECORDER OF DEEDS, D. C. *See* DISTRICT OF COLUMBIA, 3.

RENTALS FOR LAND.

PAID BY HOMESTEADERS, COVERED INTO TREASURY AS "MISCELLANEOUS RECEIPTS." *See* SUBSISTENCE HOMESTEADS, .6

RELATIONSHIP.

APPLICATION OF DEFINITION, WORLD WAR VETERANS ACT. *See* WORLD WAR VETERANS ACT.

RETIREMENT.

1. **Civil service status of employees of the Railroad Retirement Board.**—Employees of the Railroad Retirement Board are

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RETIREMENT—Continued.

subject to the Civil Service Act, Classification Act, and the Economy Act of June 30, 1932, as amended. 136.

2. **Same.—Such employees are not subject to the Civil Service Retirement Act, but they may, through continuous service and necessary transfers and reinstatements, retain their rights thereunder in that they will again become subject to its provisions upon subsequent transfers from the Board to other Government service.** 136.

3. **Same.—This opinion is subject to the ultimate determination of the constitutionality of the Railroad Retirement Act, which** has been declared unconstitutional by the Supreme Court of the District of Columbia. 136.

FOREIGN-SERVICE OFFICER, EXEMPTION FROM COMPULSORY RETIREMENT. *See* CIVIL SERVICE, 4, 5.

REVENUE ACT.

POLITICAL CHARACTER OF IRRIGATION DISTRICTS. *See* IRRIGATION DISTRICTS.

ROBINSON-PATMAN ACT. *See* CONTRACTS, 1.

ROCKY MOUNTAIN NATIONAL PARK.

UTILIZATION OF AREA WITHIN PARK FOR RECLAMATION PROJECT. *See* RECLAMATION PROJECTS, 2, 3.

ST. JOHN, VIRGIN ISLANDS. *See* VIRGIN ISLANDS, 4, 5.

ST. THOMAS, VIRGIN ISLANDS. *See* VIRGIN ISLANDS, 4, 5.

SALARIES.

DIRECTOR FEDERAL REGISTER DIVISION. *See* FEDERAL REGISTER ACT, 4.

SOURCES OUTSIDE OF GOVERNMENT FOR COMPENSATION TO OFFICERS AND EMPLOYEES. *See* PUERTO RICO, 1, 2.

SECRET SERVICE.

1. **Jurisdiction of Secret Service Division, Treasury Department.—** Under Section 12B of the Federal Reserve Act, as amended, the Secret Service Division of the Treasury Department is given jurisdiction with respect to all acts and omissions made offenses against the Federal Deposit Insurance Corporation and punishable by fine, imprisonment, or other penalty as prescribed in that section, including offenses of the character covered by Sections 112–117 of the Criminal Code, relating to bribery, forbidden contractual relationships with members of Congress, etc., in so far as the offenses thereunder are connected with "contracts or agreements" of the said Corporation. 504.

2. **Same.—**The question whether the bank should lose its insured status for having knowingly or negligently permitted the offense of the officer or employee is for determination of the Federal Deposit Insurance Corporation under Subsection (i) of Section 12B; but any investigation by the Secret Service

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SECRET SERVICE—Continued.

Division in this connection should be confined to the question of knowledge or negligence on the part of the bank or its officers, and unnecessary duplication of investigations should be avoided. 504.

3. **Same.**—A violation of Section 5209 of the Revised Statutes, as amended, which makes it an offense for any officer or employee of a Federal Reserve, Member, or insured bank to embezzle funds of such bank, etc., is punishable under that section and is subject to investigation by the Federal Bureau of Investigation of the Department of Justice; it is not an offense "punishable under" Section 12B of the Federal Reserve Act and for that reason subject to investigation by the Secret Service Division of the Treasury Department. 504.

SETTLEMENT OF WAR CLAIMS ACT.

PAYMENT OF AWARDS. *See* ADMINISTRATIVE EXPENSES.

SHIPPING.

1. **Applicability of certain acts to construction, alteration, and repair of Coast Guard vessels, boats, and aircraft.**—Contracts in excess of $2,000 for alteration or repair of U. S. Coast Guard vessels, boats, and aircraft, and contracts in excess of that amount for construction of such craft that provide for the transfer of title to the United States during the progress of the work as part payments are made, are subject to the provisions of Public Acts No. 321 (superseding the Heard Act), No. 402 (the Bituminous Coal Conservation Act of 1935), and No. 403 (amending the Davis-Bacon Act) of the 74th Congress, provided, however, that as to the last-mentioned statute the work under the contract is to be performed at a site or place known to the Government department or agency inviting bids at the time specifications for the contract involved are advertised. 418.

2. **Same.**—The meaning of the terms "public work" and "public works", as used in the above-named statutes, considered. 418.

3. **Effect of the Act of June 13, 1933, upon the definition of the term "steam vessel" contained in section 4399 Revised Statutes.**—The Act of June 13, 1933, amending Section 4399 of the Revised Statutes is ambiguous and leaves the laws relating to regulation of mechanically propelled vessels in a state of uncertainty; and clarifying legislation would seem to be desirable. 441.

4. **Same.**—Pending the enactment of such legislation, the present practice should be continued—attributing to the Act of June 13, 1933, the effect of extending to vessels not previously included in Section 4399 R. S. only those provisions of the regulations contained in Sections 4418 and 4428–4434 R. S. as amended and reenacted by that Act. 441.

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SHIPPING—Continued.

5. **Remission or mitigation of fines, penalties, and forfeitures in connection with the sale of a vessel in violation of section 9 of the Shipping Act, 1916, as amended.**—The Secretary of Commerce has authority to remit or mitigate the forfeiture of a vessel provided for in section 9 of the Shipping Act, 1916, as amended. The Secretary does not have authority to exercise the power of remission or mitigation with respect to the fine provided for the misdemeanor declared by the statute, unless and until the fine is imposed. 188.
6. **Title interest of the United States in the ex-"U. S. S. Memphis".**—It is clear from the facts stated by the Judge Advocate General of the Navy and set forth herein that the United States intended to, and did, transfer to the A. H. Radetsky Iron and Metal Company the full and unconditional title to the ex-U. S. S. *Memphis*, aground on the shores of Santo Domingo, and that the United States has no title to the vessel at this time. 328.
7. **Same.**—The failure of the Government to comply with statutory requirements relative to public contracts enacted for the sole protection of the Government does not render such contracts void, but only voidable at the Government's option, and only the Government can take advantage of such failure. 328.

CONDITION OF VESSEL FACTOR IN ESTABLISHING LOAD LINES. *See* LOAD LINE OF VESSELS.

CONSTRUCTION OF NAVAL VESSELS. *See* NAVY, 1, 2.

SEIZURE OF LEAD ON GERMAN VESSEL BY GREAT BRITAIN. *See* CLAIMS, 1.

VESSELS MEETING REQUIREMENTS FOR OCEAN-MAIL SERVICE. *See* OCEAN MAIL SERVICE, 2.

SHIPPING BOARD.

DISPOSITION OF SURPLUS REAL PROPERTY. *See* REAL PROPERTY. 2.

SILVER CERTIFICATES.

1. **Delivery of silver certificates in lieu of silver dollars under proclamation of December 21, 1933.—The President is empowered by section 12 of the Gold Reserve Act amending** paragraph (2) subsection (b), section 43 of the Agricultural Adjustment Act, **to authorize and direct the Secretary of the Treasury to issue and deliver silver certificates in lieu of silver dollars deliverable under Proclamation No. 2067** of December 21, 1933. 89.
2. **Same.—The Secretary of the Treasury may exact seigniorage for** the issuance and delivery of such silver certificates.

SINGLE BONDS. *See* BONDS, 7, 8.

SLUM-CLEARANCE PROJECTS. *See* LANDS, 1; NATIONAL HOUSING ACT, 11.

SOLDIERS. *See* ARMY, 1; WORLD WAR ADJUSTED COMPENSATION ACT.

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SOUTHERN RAILROAD CO.

EXTENSION OF TIME FOR CERTAIN BRIDGE ALTERATIONS. *See* BRIDGE ALTERATIONS, 1, 2.

STATE GRANTS OF EMERGENCY RELIEF.

BUY AMERICAN ACT. *See* EMERGENCY RELIEF.

STATUTES.

Effect of act of August 27, 1935, providing for disposition of surplus real property, upon certain earlier acts authorizing acquisition of land for reclamation purposes.—The Acts of February 2, 1911, and May 20, 1920, authorizing the Secretary of the Interior to sell, under certain conditions, lands acquired or withdrawn for irrigation purposes are not repealed by the Act of August 27, 1935, providing for the disposition, control, and use of surplus real property acquired by Federal agencies. 549.

DELEGATION OF STATUTORY POWERS. *See* PUERTO RICO, 4, 5.

VALIDITY OF ACT IMPOSING A PROPER DUTY, NOT TO BE QUESTIONED. *See* DISBURSING OFFICERS, 1–4.

STATUTORY CONSTRUCTION.

REPEAL OF STATUTE BY IMPLICATION. *See* PROPERTY, 3, 4.

STOCK.

PREFERRED DIVIDENDS, RIGHT OF UNITED STATES TO CUMULATIVE. *See* FEDERAL HOME LOAN BANKS.

SUBSISTENCE HOMESTEADS.

1. **Applicability of section 208 of the National Industrial Recovery Act with respect to providing subsistence homesteads for Indians.**—The principal, stated in opinion of September 10, 1934, that section 208 of the National Industrial Recovery Act does not contemplate collective or communal ownership, but actual purchase by those who occupy the land and the houses erected thereon, is applicable to homesteads provided for Indians beyond the limits of an Indian reservation, but is inapplicable with respect to homesteads provided for Indians within an existing Indian reservation or added to an existing one under the act of June 18, 1934, and subject to its provisions. 118.
2. **Federal Subsistance Homestead Corporation.—The Federal Subsistence Homesteads Corporation is not authorized under section 208 of the National Industrial Recovery Act to convey land and buildings to cooperatives of homesteaders for leasing to individual homesteaders.** 57.
3. **Same.—The Corporation may convey land to a cooperative for community use of homesteaders who have previously purchased homestead tracts,** and it may construct, equip, and convey to a cooperative, but not gratuitously, certain things enumerated herein administratively determined to be reasonably necessary for carrying out the purposes of the Recovery Act. 57.

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SUBSISTENCE HOMESTEADS—Continued.

4. **Same.—The Corporation may make loans to a cooperative to enable it to operate.** It may not make loans to a private industry, but it may sell or lease land to a private industry to induce it to locate near a subsistence homestead. It may also lease tracts to teachers, social workers, and professional technicians and convey to local counties, or dedicate to the public, streets, parks, etc., constructed with funds made available under section 208. 57.
5. **Same.—Moneys paid to the Corporation by homesteaders** as interest on amortization or on advances made by the Corporation **should be covered into the Treasury as miscellaneous receipts.** 57.
6. **Same.**—Lands purchased for subsistence homesteads which cannot be used immediately may be leased by the Corporation, and the rentals received should be covered into the Treasury as Miscellaneous Receipts. 57.
7. **Construction with funds appropriated therefor by the National Industrial Recovery Act.**—The Federal Subsistence Homesteads Corporation is authorized to expend money appropriated under section 208 of the National Industrial Recovery Act for the construction of subsistence homesteads without the consent of the state in which such construction is to take place. 31.
8. **Same.—The attempted taxation of the real or personal property owned by the Federal Subsistence Homesteads Corporation** by State, county, city, or other local taxing authorities **should be contested, the question of liability being ultimately for the courts to determine.** 2.
9. **Same.—The occupants of the homesteads will not be "wards of the Federal Government", in the sense that they are removed from the political status of residents of the State and of the subdivision thereof in which they live,** but will be entitled to the rights and privileges, and subject to the duties and obligations, of citizens and will be subject to arrest by local authorities. Their right to vote will depend upon State law. 2.
10. **Same.—As citizens and as potential taxpayers, the occupants of the homesteads will be entitled to such police and fire protection as may ordinarily be provided** by the State, county, **or municipality for communities similarly situated;** will be entitled to use the public schools and the public roads; and will be entitled to have their needs for such facilities considered by the local authorities in like manner as other citizens. 2.
11. **Same.—The Federal Subsistence Homesteads Corporation is authorized to pay a reasonable charge for such evidences of title** as may be required by the Attorney General to formulate **his** opinion as to the validity of the title. 2.

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SUBSISTENCE HOMESTEADS—Continued.

12. Same.—It is within the province of the United States Employees' Compensation Commission to decide whether employees of the Division of Subsistence Homesteads in Washington and employees of the Federal Subsistence Homesteads Corporation on the various projects in the various States are entitled to the benefit of the United States Employees' Compensation Act; and it is suggested that the matter be handled with the Commission. 2.
13. Same.—It is not the policy of the United States Government to carry insurance on its property. However, the occupants of the homesteads will have, or will in time acquire, insurable interests, and such interests may properly be insured either by the individuals themselves or by the Corporation acting in their behalf and at their expense. 2.
14. Same.—The Federal Subsistence Homesteads Corporation may lawfully acquire options as an incident of the purchase of land. 2.
15. Same.—The attempted imposition of license, franchise, occupation, income, and excise taxes upon the Federal Subsistence Homesteads Corporation by Delaware or any other State should be contested, the question of liability being ultimately for the courts to determine. 2.
16. Same.—It is unnecessary for the Federal Subsistence Homesteads Corporation to qualify and register as a foreign corporation in States other than Delaware. 2.
17. Same.—To the extent that the Corporation must supply a facility it may contract therefor, and there is no disability to contract with a State or other political subdivision for the supplying of a facility which the State or other political subdivision is not otherwise legally obligated to furnish. 2.
18. Same.—The Corporation may make loans for the purchase of livestock, tools, implements, seed, fertilizer, and household furnishings and furniture, or may itself purchase and resell them to the occupants of the homesteads, when determined to be reasonably necessary in order to carry out the purposes of the statute, and assuming that such regulation as may be issued comes within its terms. 2.

SUGAR.

Purchase and distribution of surplus sugar for relief purposes.—The Secretary of Agriculture is authorized to purchase surplus sugar within the areas designated in section 15 (f) of the Agricultural Adjustment Act, as amended, with funds set apart for such use, and to distribute it for relief purposes in continental United States without charging it against the quotas of such areas. 106.

SUPPLIES.

GOVERNMENT CONTRACTS, ANTITRUST LAWS. *See* CONTRACTS, 1.

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TARIFF. *See* CUSTOMS LAWS.

TAXATION.

1. **Cotton control act.—Questions arising under the Bankhead Act.—** There is no authority for the suspension or elimination of the tax levied upon cotton under the Bankhead Cotton Control Act other than that contained in section 2 of that Act. 87.
2. **Same.—A finding and proclamation by the President that the economic emergency in cotton production and marketing has ceased to exist would terminate the taxing provisions of the** Cotton Control Act with respect to all cotton harvested after the effective date of the proclamation. 87.
3. **Same.—**Such proclamation made under, and for the purposes of, the Cotton Control Act would have no effect upon operations concerning cotton under the Agricultural Adjustment Act. 87.
4. **Taxation of motor-vehicle fuels sold on Federal reservations in Territory of Hawaii.—Section 10 of the Act of June 16, 1936, 49 Stat. 1521, permits the Territory of Hawaii to levy taxes on motor-vehicle fuels sold,** as provided therein, **upon United States military or other reservations** when such fuels are not for the exclusive use of the United States. The officers in charge of Federal reservations are required merely to report the amount of motor-vehicle fuels sold otherwise than for the exclusive use of the United States. 519.
5. **Same.—It lies with the territorial government and its appropriate officers to construe its laws and determine whether taxes are to be levied** upon sales not for the exclusive use of the United States. Questions respecting the legality of taxes so levied would concern the territorial government and those subjected to the tax, and would not arise in the administration of the War Department. 519.
6. **Same.—An officer of the War Department chargeable with collecting the taxes and paying them over to the territorial government acts on behalf of the Territory under authority from the Congress.** Such officer is not authorized to review the acts of other public officers whose duty it is to levy the taxes and for that purpose to interpret the laws; on the contrary, he should consult them if in doubt respecting the levy, collection, or payment of the taxes on sales of motor-vehicle fuels within the Federal reservation. 519.
7. **Same.—State taxation of motor-vehicle fuels sold in national parks.—National parks are reservations within the meaning of Section 10 of the Hayden-Cartwright Act of June 16, 1936, which permits any State, Territory, or the District of Columbia to tax motor-vehicle fuels when sold by or through post exchanges,** ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies located on United States military or other reservations when such fuels are not for the exclusive use of the United States;

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TAXATION—Continued.

and by virtue of that Act the States may levy taxes on gasoline and other motor-vehicle fuels sold by concessioners located in national parks when such fuels are not for the exclusive use of the United States. 522.

ASSESSMENTS AND WATER RATES, MORTGAGED PROPERTY. *See* MORTGAGES, 10.

COMPENSATION PAID ADMINISTRATORS OF CALIFORNIA WORKMEN'S COMPENSATION FUND. *See* WORKMEN'S COMPENSATION FUND, 1, 2.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION. *See* SUBSISTENCE HOMESTEADS, 15.

PROPERTY OF FEDERAL SUBSISTENCE HOMESTEADS CORPORATION. *See* SUBSISTENCE HOMESTEADS, 8.

TAYLOR GRAZING ACT.

AUTHORIZING GRAZING DISTRICTS ON PUBLIC LANDS, LIMITED ACREAGE. *See* GRAZING LANDS, 1, 2.

THOMAS JEFFERSON TERRITORIAL EXPANSION MEMORIAL.

1. **A proposed Executive order approving the establishment and authorizing the construction of the Thomas Jefferson Territorial Expansion Memorial,** in accordance with the plans and specifications of the United States Territorial Expansion Commission at an estimated cost of $30,000,000, recites: That the United States Territorial Expansion Memorial Commission created pursuant to public resolution approved June 15, 1934, recommended in its report of May 1, 1935, the establishment and construction of a permanent memorial, on the site and in accordance with the plans given in the report, at an estimated total cost of $30,000,000; that the city of St. Louis, Missouri, has agreed to contribute the sum of $7,500,000 to the estimated cost of the construction of the memorial; that the State of Missouri has consented to the acquisition by the United States of the lands necessary for such project; that the memorial will commemorate the territorial expansion of the United States and preserve the historical associations connected therewith for the benefit, education, and inspiration of the American people; and that the President finds that the construction of the Memorial will provide work relief and increase employment by providing for a useful project. It appears that only a part of the sum of $22,500,000 to be contributed by the Government for the proposed project is now available. 362.
2. **Same.**—*Held:* (1) The proposed project is one which the President is authorized to adopt and prosecute under title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935. 362.
3. **Same.**—(2) The President has no authority to commit the Congress to future appropriations for the proposed project,

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THOMAS JEFFERSON TERRITORIAL EXPANSION MEMORIAL—Con. and the Government may not legally accept the sum of $7,500,000 from the City of St. Louis unless the authorization for the project provides for its construction and completion with funds now available and at the disposal of the President. 362.

4. **Same.**—(3) Since the full sum of $22,500,000 required to be contributed by the President is not now available for the project the proposed Executive order is unauthorized. 362.
5. **Same.**—(4) If the Congress should adopt this project as a Federal project, to be constructed at a cost of $30,000,000, the City of St. Louis to contribute $7,500,000 and the Government $22,500,000, the President would be authorized to adopt such portion of the project as he might desire, as a project to be carried out under title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935, and also to allocate thereto such funds as might then be available under the latter Act and to proceed immediately with the expenditure of such allocation. 362.

TITLE TO LAND.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION. *See* SUBSISTENCE HOMESTEADS, 11.

TOBACCO.

IMPORTED FROM CUBA. *See* CUSTOMS LAWS, 3, 4.

TRANSPORTATION.

EMPLOYEES TO AND FROM THE VIRGIN ISLANDS. *See* VIRGIN ISLANDS, 1.

TRANSPORTATION RATES.

1. **Rates that contract carriers by motor vehicles may quote to Government under Section 218 of Motor Carrier Act.**—The provisions of Section 218 of the Motor Carrier Act, 1935, relating to minimum rates that may be charged by contract carriers by motor vehicles, do not apply to contracts with the Government; and contract carriers by motor vehicles may quote the Government lower rates than those contained in their schedules on file with the Interstate Commerce Commission. 452.
2. **Same.**—The *maxim expressio unius exclusio alterius* considered and held inapplicable. 452.

TREASURY DEPARTMENT.

COMPETITIVE EXAMINATIONS FOR CERTAIN REINSTATED EMPLOYEES MCKELLAR AMENDMENT. *See* EMERGENCY APPROPRIATION ACT, 1, 2.

COMPROMISE, AUTHORITY TO REVIEW MERITS. *See* COMPROMISE, 11–14.

CONTINUANCE OF EMPLOYEES IN DUTY STATUS WITHOUT PAY, MCKELLAR AMENDMENT. *See* EMERGENCY APPROPRIATION ACT, 1935, 5.

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TREASURY DEPARTMENT—Continued.

LIMITATION ON USE OF APPROPRIATION FOR PAYMENT OF CERTAIN EMPLOYEES. *See* EMERGENCY APPROPRIATION ACT, 1935, 3, 4.

PAYMENT OF ADMINISTRATIVE EXPENSES MIXED CLAIMS COMMISSION. *See* ADMINISTRATIVE EXPENSES.

SUGGESTED REGULATIONS FOR FOREIGN TRADE ZONES. *See* FOREIGN TRADE ZONES, 1, 2.

TREASURY OF UNITED STATES.

MONEYS PAID BY HOMESTEADERS AS INTEREST, COVERED IN AS "MISCELLANEOUS RECEIPTS." *See* SUBSISTENCE HOMESTEADS, 5.

TREASURY, SECRETARY OF.

COMPROMISE OF CLAIMS, AUTHORITY FOR. *See* COMPROMISE, 3–5.

CONCURRENCE REQUIRED IN ISSUANCE OF DUPLICATES OF BONDS GUARANTEED BY UNITED STATES. *See* BONDS, 5, 6.

MEMBER OF BOARD ON FOREIGN TRADE ZONES. *See* FOREIGN TRADE ZONES, 1, 2.

PERSHING HALL MEMORIAL FUND. *See* PERSHING HALL.

SEIGNORAGE FOR ISSUE OF SILVER CERTIFICATES. *See* SILVER CERTIFICATES, 1, 2.

SINGLE BONDS COVERING TWO TYPES OF ADVANCES UNDER DIFFERENT STATUTES, LEGALITY. *See* BONDS, 7, 8.

UNIFORMS.

MANUFACTURE, FROM CLOTH OWNED BY GOVERNMENT. *See* CONTRACTS, 4.

UNION OF SOVIET SOCIALIST REPUBLICS.

LOSSES TO UNITED STATES EMPLOYEES THROUGH RATE OF EXCHANGE IN MAKING PURCHASES IN U. S. S. R. *See* EXCHANGE, 1, 2.

UNITED SHIPBUILDING AND DRY DOCK CORPORATION. *See* NAVY, 1. 2.

UNITED STATES.

CESSION OF JURISDICTION OVER LAND PURCHASED FROM NEVADA. *See* JURISDICTION, 1–8.

DISPOSITION OF REAL PROPERTY. *See* REAL PROPERTY, 1, 2.

GUARANTY OF CERTAIN BONDS BY GOVERNMENT. *See* BONDS, 1, 2.

ISSUANCE OF DUPLICATE GUARANTEED BONDS BY GOVERNMENT. *See* BONDS, 5, 6.

NATIVES OF VIRGIN ISLANDS. *See* CITIZENSHIP, 9.

RIGHT TO CUMULATIVE PREFERRED DIVIDENDS ON FEDERAL HOME LOAN BANKS. *See* FEDERAL HOME LOAN BANKS.

RIGHTS IN PATENTS. *See* PATENTS, 1–3.

RIGHTS UNDER DULY ACQUIRED PATENTS. *See* PATENTS, 3.

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UNITED STATES—Continued.

STATUS OF NATIONS MAKING "TOKEN PAYMENTS" ON UNITED STATES OBLIGATIONS. *See* DEBTOR NATIONS, 1.

TITLE INTEREST IN EX "U. S. S. MEMPHIS." *See* SHIPPING, 6.

UNITED STATES CODE.

VIOLATION OF SECTION 203, TITLE 18. *See* ARMY, 7, 8.

UNITED STATES HIGH COMMISSIONER.

DESIGNATION OF ACTING, FOR PHILIPPINE ISLANDS. *See* PHILIPPINE ISLANDS

UNITED STATES TERRITORIAL EXPANSION COMMISSION.

CONSTRUCTION OF THOMAS JEFFERSON MEMORIAL. *See* THOMAS JEFFERSON TERRITORIAL EXPANSION MEMORIAL, 1.

VESSELS.

EX "U. S. S. MEMPHIS." *See* SHIPPING, 6.

VETERANS AFFAIRS ADMINISTRATION.

AUTHORITY TO ABANDON HIGHWAY AT BATH, N. Y. *See* HIGHWAYS, 1.

VETERANS OF WORLD WAR. *See* WORLD WAR VETERANS ACT.

VETO.

MUNICIPAL ORDINANCE VETOED BY GOVERNOR OF VIRGIN ISLANDS. *See* VIRGIN ISLANDS, 4, 5.

VIRGIN ISLANDS.

1. **Availability of appropriation for the Virgin Islands for certain transportation of persons appointed to positions in such islands from the United States.**—The appropriation for the Virgin Islands for the fiscal year 1935 (Pub. No. 109, 73d Cong.) is not available for payment of the return transportation of persons appointed from the continental United States to positions in the Virgin Islands who may be discharged without prejudice or resign after service of not less than 1 year, or for transportation for employees from the Virgin Islands to the United States and return for the purpose of taking leave. 47.
2. **Same.**—The rule of *ejusdem generis* and *expressio unius est exclusio alterius* held applicable. 47.
3. **Citizenship of natives of the Virgin Islands.**—Except as indicated, all persons born in the Virgin Islands at the time of their annexation by the United States but were residing in the United States or any of its insular possessions or territories on June 28, 1932, are to be deemed citizens of the United States under the Act of February 25, 1927, 44 Stat. 1234, as as amended. 525.
4. **Legal status of ordinance repassed by local council of St. Thomas and St. John Virgin Islands after veto by Governor.**—The provision in the Act of June 22, 1936, 49 Stat. 1807, for a merely suspensive veto by the Governor of the Virgin Islands of bills passed by the local legislative bodies, with subsequent

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VIRGIN ISLANDS—Continued.

presentation of the bills to the President for approval or disapproval, will become effective only with respect to the bills passed by the new legislative bodies provided for in that Act. 536.

5. **Same.**—The action of the Council of St. Thomas and St. John in passing an ordinance again on October 8, 1936, after veto by the Governor was without legal effect. 536.

WAGES.

LABORERS AND MECHANICS ON ALLEY PROJECTS, DISTRICT OF COLUMBIA. *See* DISTRICT OF COLUMBIA, 1, 2.

WAR DEBTS.

FOREIGN GOVERNMENTS MAKING "TOKEN PAYMENTS" ON OBLIGATIONS TO THE UNITED STATES. *See* DEBTOR NATIONS, 1, 2.

WAR DEPARTMENT.

INTERCHANGE OF PROPERTY BETWEEN ARMY AND NAVY. *See* PROPERTY, 1–5.

MANUFACTURE OF UNIFORMS. *See* CONTRACTS, 4.

OFFICER OF, COLLECTING TAXES AND PAYING THEM OVER TO TERRITORY OF HAWAII IS AN AGENT OF TREASURY DEPARTMENT. *See* TAXATION, 6.

PROCUREMENT OF AIRCRAFT, AERONATUICAL ACCESSORIES. *See* AIRCRAFT, 3.

REMAKING COTTON MATTRESSES. *See* CONTRACTS, 4.

WAR, SECRETARY OF.

ALTERATION OF CERTAIN RAILROAD BRIDGE, AUTHORITY TO EXTEND TIME FOR. *See* BRIDGE ALTERATIONS, 1, 2.

JURISDICTION IN CONNECTION WITH ADJUDICATION OF CLAIMS FOR LOST PROPERTY. *See* ARMY, 4.

MEMBER OF BOARD ON FOREIGN TRADE ZONES. *See* FOREIGN TRADE ZONES, 1, 2.

REJECTION OF BID ON RADIO TRANSMISSION EQUIPMENT, ETC. *See* CONTRACTS, 2, 3.

WICHITA NATIONAL FOREST, OKLA.

APPLICATION OF MINING LAWS. *See* MINING LAWS, 1.

WICHITA NATIONAL GAME RESERVE.

APPLICATION OF MINING LAWS. *See* MINING LAWS, 1.

WORDS AND PHRASES.

1. **"Active service" and "active list."**—The term "active list" relates only to the active list of the regular Army, while the term "in active service" is broader and includes not only personnel on the active list of the regular Army but also those on the retired and reserved lists who are in an active duty status. 241.

2. **"Administrative ruling."**—When the Secretary of Agriculture gives public notice that the cigar tobacco adjustment program

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WORDS AND PHRASES—Continued.

in the United States has been abandoned or substantially abandoned, the public notice referred to is not an "administrative ruling" within the meaning of that term as used in Article XIII of the Cuban Trade Agreement. 428.

3. **"Any public work of the United States."**—Contracts exceeding $2,000 in amount, for alteration or repairs of Coast Guard vessels, boats and aircraft, since the property to be altered or repaired belongs to the United States, fall within the category "any public * * * work of the United States" as those words are used in the act of Aug. 24, 1935, which act repealed the so-called Heard act. 421.

4. **"Emergency."**—The word "emergency" is defined as a sudden or unexpected occurrence or condition calling for immediate action. This can hardly be applied to a permanent condition of inadequacy of service. 148.

"IN ACTIVE SERVICE." *See Infra*, "ON ACTIVE DUTY."

5. **"On active duty" and "in active service."**—There is an important distinction between being "on active duty" and being "in active service" or "on the active list." The former denotes the physical presence of the soldier at his proper station, while the latter denotes his status in the army. 241.

"ON THE ACTIVE LIST." *See Supra*, "ACTIVE SERVICE."

6. **"Other necessary miscellaneous expenses."**—"Where a statute enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like', so that persons or things therein comprised may be read as *ejustem generis* with, and not of a quality superior to or different from, those specifically enumerated. * * * ." Examination of the 1935 Virgin Islands appropriation act fails to disclose that the Congress intended that this rule of interpretation should not be applied in determining the meaning of the act, it is therefore my opinion that the words "other necessary miscellaneous expenses" do not include unofficial traveling expenses. 49.

7. **"Political subdivisions."** Special assessment districts lawfully created for public purposes under the authority of the several states and authorized to exercise a portion of their respective sovereign powers are state "political subdivisions" within the meaning of the Revenue Act of 1913, and the opinion of Jan. 13, 1914, (30 Op. 252) should not be disturbed. 563.

9. **"Project."**—Attributing to the word "project" the significance of definitions given in the Standard Dictionary and Webster's International Dictionary, it must be concluded that Section 207 of the National Housing Act, does not require that insurance for a low-cost housing project must be deferred until the project is completed. 336.

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WORDS AND PHRASES—Continued.

10. **"Projects."**—Grants from funds appropriated by Public Resolution No. 11, approved April 8, 1935, to the Governors of the several States for emergency relief purposes are "projects" within the meaning of section 13 of that Resolution, whether for construction work or for the purpose of such items as food and clothing; and such grants are subject to the provisions of Title III of the Treasury and Post Office Appropriation Act, fiscal year 1934 (47 Stat. 1520). 207.
11. **"Property or."**—The words "property or" appearing before the word "project" in the proviso of Section 207, National Housing Act, were not in the statute as originally enacted, but were added by Section 344, Bankruptcy act of 1935. The purpose of this amendment was to insure that the statutory provision applied to low-cost housing property as well as to low-cost housing projects. 335–336.
12. **"Public work and public works."**—The employment of laborers and mechanics in making repairs to Government vessels is employment upon a "public work" of the United States within the language "any of the public works of the United States" in the 8-hour law of August 1, 1892 (27 Stat. 340; 29 Op. 395). 422.
13. **"This act."**—The words "this act," as used in section 18, Act of June 18, 1934 (48 Stat. 984), cannot properly be considered as designating only a part, or parts, of the Act, and hence the third and succeeding proviso in section 3 will be inoperative if the vote under section 18 is against the application of the act. 121.

WORKMEN'S COMPENSATION FUND, CALIFORNIA TAXATION.

1. **Compensation paid to officers and employees administering State Workmen's Compensation Fund of California.**—It is doubtful whether the opinion of the Acting Attorney General of July 19, 1918 (31 Op. 308), should be reconsidered, for the questions dealt with therein are essentially different from the question now under consideration, and the conclusion reached in that opinion is not questioned and does not necessarily affect the case presented. 199.
2. **Same.**—The opinion of July 19, 1918, should be considered as confined to the specific questions therein considered and not as controlling in determining whether compensation paid from the State Workmen's Compensation Fund of California to officers and employees administering such fund is taxable by the Federal Government. 199.

WORLD WAR ADJUSTED COMPENSATION ACT.

1. **Entitlement to compensation.**—Claimant was inducted into military service October 20, 1917, but was absent without leave and charged with desertion from December 2, 1917, until October 10, 1919, when he was arrested and returned to the

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WORLD WAR ADJUSTED COMPENSATION ACT—Continued.

Army. Subsequently, because of his mental condition the charge of desertion was removed and he was honorably discharged from the Army December 17, 1919. 202.

2. Same.—Opinion of Attorney General Stone of July 26, 1924 (34 Op. 228), *distinguished.* 202.

3. Same.—*Held,* the claimant is not entitled to compensation under the World War Adjusted Compensation Act. 202.

WORLD WAR VETERANS, ACT.

Applicability of definitions of relationship and dependency contained in the World War Veterans' Act.—The definitions of relationship and dependency contained in the World War Veterans' Act, 1924, as amended, are applicable in awarding compensation to or for dependents of World War veterans or in apportioning compensation payable to veterans under sections 27 and 28, Title III, Public. No. 141, Seventy-third Congress. 103.

YACHT.

REMISSION OF FORFEITURE FOR VIOLATION OF SHIPPING ACT, 1916, AS AMENDED. *See* SHIPPING, 5.

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